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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-828

CURTIS CRAIG,
and
CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Appellants,

vs.

Hon. DAVID BOREN, Governor, State of Oklahoma,
Hon. LARRY DERRYBERRY, Attorney General,
State of Oklahoma,
Hon. D. M. BERRY, Chairman,
Hon. LAWTON L. LEININGER, Vice-Chairman,
Hon. J. L. MERRILL, Secretary-Member,
Oklahoma Tax Commission,
Hon. RAY WALL, Presiding Judge,
Ninth Judicial District Court, State of Oklahoma,
Hon. CHARLES H. HEADRICK, District Attorney,
Ninth Judicial District, State of Oklahoma,
Hon. ROSE JARVIS, District Court Clerk,
Payne County, State of Oklahoma,
Hon. FRANK PHILLIPS, Sheriff,
Payne County, State of Oklahoma,
and
Hon. HILARY DRIGGS, Chief of Police,
Stillwater, Oklahoma,
Appellees.

JURISDICTIONAL STATEMENT

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SUMMARY

This is a direct appeal, 28 U.S.C. 1253, from a three-judge District Court decision upholding the constitutionality of the age-sex discrimination in the Oklahoma liquor laws, 37 O.S.A. 241, 245, allowing females to buy 3.2% beer at age 18, but prohibiting males therefrom till age 21.

Substantiality is premised upon an express finding of "a substantial federal constitutional question" herein by the Tenth Circuit (Appendix F), and upon the obvious conflict with such controlling decisions as *Stanton* v. *Stanton*, 95 S.Ct. 1373, *Frontiero* v. *Richardson*, 411 U.S. 677, and even the locally-cognizable *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, and *Bassett* v. *Bassett* (Okla. App., 1974) 521 P.2d 434.

Other substantial issues posed include that of the relevant test for sex-equality claims, left unresolved in *Stanton* v. *Stanton*; whether sexual and related discriminations are somehow more tolerable with respect to alcohol, *Goesaert* v. *Cleary*, 335 U.S. 464, cf. *California* v. *LaRue*, 409 U.S. 109; the misuse of "statistics" to "prove" male "inferiority," see *Jackson* v. *Evers* (5th Cir., 1966) 357 F.2d 653; the irrebutable penalization of one entire sex for the alleged indiscretions of one or two percent thereof, *Stanley* v. *Illinois*, 405 U.S. 645, *Cleveland* v. *LaFleur*, 414 U.S. 632; and the paramount supremacy of Equal Protection even assuming a male inferiority, see *State* v. *Chambers* (1973) 63 N.J. 287, 307 A.2d 78 (concurring opinion, at 85).

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Ninth Judicial District, State of Oklahoma,
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Payne County, State of Oklahoma,
Hon. FRANK PHILLIPS, Sheriff,
Payne County, State of Oklahoma,
and
Hon. HILARY DRIGGS, Chief of Police,
Stillwater, Oklahoma,
Appellees.

JURISDICTIONAL STATEMENT

Come now Appellants, Curtis Craig, and Carolyn Whitener d/b/a "The Honk and Holler," and for their Jurisdictional Statement herein respectfully allege and aver as follows:

A. THE DECISION(S) BELOW

The decision whose review is sought herein is styled *Mark Walker, et al.* v. *Hon. David Hall, Governor, et al.*, and was rendered by the United States District Court for the Western District of Oklahoma, sitting as a three-judge panel pursuant to 28 U.S.C. 2281 et seq, in Western District of Oklahoma Case No. CIV-72-867, on May 17, 1975. The decision ("Memorandum Opinion") is unreported, but is reproduced at Appendix A hereto. A separate "judgment" was likewise entered on the same date, which is also unreported, but reproduced at Appendix B hereto. A timely and proper motion for new trial (filed on May 27, 1975) was overruled on July 14, 1975, which order overruling same, also unreported, is reproduced at Appendix C hereto; and a timely and proper notice of appeal, reproduced at Appendix D hereto, was filed with the Clerk of the United States District Court for the Western District of Oklahoma on August 11, 1975.

There were also two previous decisions, both unreported, in this litigation. The first of these was the "Order of Dismissal" herein, entered by the U.S. District Court for the Western District of Oklahoma, sitting as a single judge, on February 14, 1973 (Appendix E hereto), in effect granting the Appellees' Rule 12(b)(6) motion to dismiss. The other was the decision on appeal from the single District Judge's dismissal, entered by the United States Court of Appeals for the Tenth Circuit sub nom. *Walker, et al.* v. *Hon. David Hall, Governor, et al.*, 10th

Cir., No. 73-1267, on October 23, 1973, wherein a unanimous panel of the Tenth Circuit concluded that the Complaint did in fact raise "a substantial federal constitutional question," and therefore vacated the single District Judge's dismissal and remanded the cause back to the U.S. District Court for the Western District of Oklahoma for trial and determination by a panel of three judges pursuant to 28 U.S.C. 2281 et seq (Appendix F hereto).

B. SUPREME COURT JURISDICTION

The action below was a civil rights complaint, 42 U.S.C. 1983, brought in the United States District Court for the Western District of Oklahoma under 28 U.S.C. 1331, 1343(3), 1343(4), 1391(b), 1392(a), and 1393(b), for a declaratory judgment, 28 U.S.C. 2201 et seq, to judicially determine and adjudicate as unconstitutional as violative of Fourteenth Amendment Equal Protection and Due Process a certain State statutory scheme, 37 Okla. Stat. Ann. 241, 245, allowing females to purchase 3.2% beer at age 18, but irrationally and invidiously prohibiting males from purchasing same until age 21. Since further relief by way of writs of injunction to enjoin the enforcement of this unconstitutional age-sex discriminatory State statute was also sought, the matter was [eventually] tried to a three-judge District Court under 28 U.S.C. 2281 et seq.

As stated under Part A, supra, the decision and judgment herein appealed were entered on May 17, 1975; the motion for new trial was overruled on July 14, 1975; and the notice of appeal was filed with the Clerk of the District Court on August 11, 1975. See Appendices A-D hereto. And on October 8, 1975, Mr. Justice White granted a timely motion to extend the docketing time for this appeal to October 25, 1975. October Term, 1975, No. A-316.

Jurisdiction to review the three-judge District Court decision below by direct appeal is conferred upon the Supreme Court by 28 U.S.C. 1253. Cases illustrative of the Supreme Court's actual exercise of such direct appellate jurisdiction over three-judge District Court decisions involving sex-equality questions include *Goesaert* v. *Cleary* (1948) 335 U.S. 464, *Frontiero* v. *Richardson* (1973) 411 U.S. 677, *Geduldig* v. *Aiello* (1974) 417 U.S. 484, *Schlesinger* v. *Ballard* (1975) 419 U.S. 498, and *Weinberger* v. *Wiesenfeld* (1975)____ U.S.____, 95 S.Ct. 1225, 43 L.Ed.2d 514.

C. STATUTES(S) CHALLENGED

This action directly challenges the constitutionality of 37 Okla. Stat. Ann. 241, 245, which taken together permit the sale of 3.2% beer for off-premises consumption to females at age 18, but discriminatorily and invidiously prohibit the sale thereof to males until age 21. These statutes read as follows:

MINORS

§241. Sale, barter or gift to minor unlawful.—It shall be unlawful for any person who holds a license to sell and dispense beer and/or any agent, servant, or employee of said license holder to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) per cent of alcohol measured by weight. Provided, a parent as regards his own child or children, is excepted from the provisions of this Act.

§245. "Minor" defined.—A "minor", for the purposes of Sections 241 and 243 of Title 37 of the Oklahoma Statutes, is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years.

Section 241, supra, can be found at page 2534 of Volume 2 of the [official] "Oklahoma Statutes, 1971," and Section 245, supra, is found at page 391 of the [official] "Oklahoma Statutes, 1974 Supplement." [The 1975 Supplement to the official Oklahoma Statutes has not yet been published.]

D. QUESTION(S) PRESENTED

The ultimate question behind this appeal, and indeed this entire litigation, is, simply, whether 37 O.S. 241, 245, supra, permitting girls to buy 3.2% beer at age 18 while capriciously prohibiting men therefrom until age 21, is unconstitutional as repugnant to the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution, especially as construed in such cases as *Stanton* v. *Stanton* (1975)____ U.S.____, 95 S.Ct. 1373, 43 L.Ed.2d 688, and *Frontiero* v. *Richardson* (1973) 411 U.S. 677.

This particular case analyzes the foregoing ultimate question into a number of lesser-included questions, such as:

Just what is the test for determining the constitutionality of statutory age-sex discriminations such as that at bar: the "suspect classification" test, or the "rational relationship" test, or the "something in between" test—all as expressly left unresolved in *Stanton* v. *Stanton*, supra, 95 S.Ct. at 1377?

Regardless of what the proper test might be, may an age-sex discrimination such as that at bar be sustained, as it was by the District Court, on the basis of a "statistical" showing that *one or two percent* of the *unfavored* sex display a degree of irresponsibility with respect to certain activity, as opposed to only a smaller percentage of the *favored* sex displaying such irresponsibility?

Phrased somewhat differently, if, say, "statistics" show that about two percent of the unfavored sex have been arrested for alcohol-related offenses, as opposed to somewhat less than one percent of the favored sex, is this statistical differentiation sufficient to erect a "permanent irrebutable presumption of fact" which can justify excluding the *entirety* of that one sex (within a certain age group), *including the innocent 98%*, from access to legally *non*-intoxicating 3.2% beer, while at the same time conferring upon the entirety of the other sex (within the same age group), including even the *guilty* portion thereof, *unrestricted* access to such alcoholic beverages?

Related to the foregoing is the question of whether the Equal Protection Clause only applies in a "watered down" sense with respect to State legislation regarding intoxicating (and *a fortiori*, *non*-intoxicating) liquors, so as to allow a certain degree of latitude to State discriminations regarding alcohol on the basis of sex (or of race, or religion, or economic status, or any other such "criterion" in passing vogue with a legislative majority)?

And, if "statistics" are to be deemed an appropriate basis upon which to justify invidious statutory discriminations based on sex (or race, or religion, etc.), under whatever may be the test for the constitutionality vel non of such discriminations, then what kind of judicial safeguards are to be erected around the use and admission of such statistics in constitutional litigation? To take the decision of the District Court below as an example, are mere *arrest* (i.e., *accusation*) statistics, as opposed to actual *conviction* statistics, to be deemed a sufficient justification for the penalization of one entire sex (or race, or creed, or class)? How also are we to insure

against various biases in the collection and compilation of such statistics? And how widespread must a certain behaviour be amongst the target sex (or race, religion, class) before we have a statistically valid sampling sufficient to declare, as did the District Court, the *entire* sex (race, religion, class) so characterized thereby?

In other words, if only one or two percent of a certain sex or similar "classification" is even so much as *accused* of having a particular deleterious propensity, may we properly punish that *entire* classification; or does not Due Process of Law require some "less drastic alternative" to be implemented, directed more discerningly at the one or two percent of "troublemakers" within the classification, rather than allowing blind resort to the bureaucratically easier-to-administer "mass punishment" approach?

E. STATEMENT OF THE CASE

As stated earlier herein, this action has been from its inception an Equal Protection and Due Process attack on the Oklahoma statutory scheme, 37 O.S. 241, 245, which prohibits the sale of 3.2% beer to males in the 18 to 21 year old age group while freely allowing the sale thereof to the female members of the identical age group. Therefore, the claim of Federal unconstitutionality was squarely raised in the Complaint.

The Plaintiffs were originally one Mark Walker, a young male student at Oklahoma State University, Stillwater, Oklahoma, then 20 years of age, and Mrs. Carolyn Whitener, a licensed retail vendor of [*inter alia*] 3.2% beer at the "Honk and Holler" drive-in convenience store in Stillwater. During the pendency of this litigation Mark Walker passed his 21st birthday, whereupon one of his fraternity brothers, Curtis Craig, who is still under

21, joined the case as an additional Plaintiff. Curtis Craig and Mrs. Whitener are the present Appellants. Mr. Craig is desirous of purchasing 3.2% beer, and Mrs. Whitener in selling it to him, all on a parity as freely allowed to 18 to 21 year old females, but both are thwarted therefrom by the statutes in question, wherefore declaratory and injunctive relief is sought.

The Defendants (Appellants herein) are generally the State officials who are charged with the enforcement of the statutes in question. As none of the Defendants has had any personal interest in this litigation aside from his official capacity, and since only declaratory and injunctive relief has been sought, counsel for both sides have simply been substituting Defendants (see Federal Rule of Civil Procedure No. 25(d)) as the various State offices have changed incumbents.

After all "procedural" problems were resolved at a pre-trial conference, this case was tried to the three-judge panel squarely on the merits of the claim of unconstitutionality herein. The evidence adduced by the Plaintiffs, Appellants herein, consisted essentially of the expert testimony of a practicing psychiatrist, holding a baccalaureate in biology and chemistry as well as an M.D. degree, and a professor of biological psychology at the University of Oklahoma Medical School's Center for Alcohol-Related Studies. These two witnesses testified affirmatively that there is absolutely no chemical, biological, anatomical, medical, psychiatric, psychological, social, or similar basis whatsoever for the statutory discrimination in question; in fact, the O.U. professor testified in particular to a series of experiments that he himself had conducted into the difference between young adult males and females in their responses to alcohol, the results of which experiments established that the

male is actually somewhat superior to the female in his capacity to handle equivalent amounts of alcohol. The Plaintiffs also adduced certain 1970 Census statistics, showing the number of 18 to 21 year old males and females in Oklahoma.

The evidence adduced by the Defendants, Appellees herein, was entirely statistical. In essence, their other exhibits were consistent with and cumulative to their Exhibit One, the 1973 State-wide arrest statistics for alcohol-related offenses in Oklahoma. These statistics tended generally to indicate that while about 98.00% of Oklahoma's 18 to 21 year old male citizenry had *not* been arrested in 1973 for Driving While Intoxicated and Public Drunk violations, nevertheless, an even greater percentage, 99.82%, of the like-aged female population had not been so arrested.

The District Court overruled the Plaintiffs' objections to the Defendants' statistics, one chief of which objections was that these data were mere *arrest* statistics, not *conviction* statistics, and were therefore totally incompetent to prove or disprove anything about either (or both) of the two sexes in question; and, after evidently placing greater credence in the Appellees' statistics than in the Appellants' expert testimony, the District Court next rejected the argument that the difference between the 98.00% male sobriety rate and the 99.82% female sobriety rate was too inconsequential to justify a prohibition regarding 3.2% beer against all males but against no females in the referenced age group. Instead, the Court decided to take cognizance *only* of the microscopic percentages of either sex that had suffered alcohol-related arrests, and then concluded that since within those minute and statistically anamolous percentages (2.00% for the boys and 0.18%

for the girls) there appeared to be *some* differential between the sexes, this differential amongst those few of either sex having the problem sufficed to sustain the discrimination of no males and all females under the "rational relationship" test, which the Court declared to be the relevant test governing sex-equality questions, at least in the regulation of non-intoxicating beer, which the Court felt was somewhat less subject to Equal Protection scrutiny than other areas of State regulation.

The Court also rejected as an administrative burden the plea that some sort of a sexually neutral testing system be established to identify the actual irresponsible members of each sex, which the Appellants had urged as a constitutionally-required "less drastic alternative" to the statute's illogical premise that the goal of denying 3.2% beer to those very few young adults not deserving access thereto could best be achieved by a blanket denial thereof to the entirety of one sex and a blanket allowance thereof to the entirety of the other sex. Finally, the District Court distinguished such contrary age-sex rulings as *Stanton* v. *Stanton*, supra, 95 S.Ct. 1373, and *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, on the basis that whereas those age-sex discriminations had been founded on untenable "old notions" and ill-defined "facts of life," the instant age-sex discrimination was shown to be based on competent bio-scientific evidence.

This, in a nutshell, is the case at bar.

F. THIS CASE IS SUBSTANTIAL

1. The Prior Appellate Adjudication of Substantiality

The Appellants would at the outset advise the Court that their case has *already* been squarely adjudicated to

present "a substantial federal constitutional question," by the U.S. Court of Appeals for the Tenth Circuit, to which they have previously resorted in order to get this matter heard by a three-judge panel. *Walker, et al.* v. *Hon. David Hall, Governor, et al.*, 10th Cir., No. 73-1267, October 23, 1973 (Appendix F hereto), a decision, incidentally, rendered by a unanimous panel which was not only presided over by the Chief Judge thereof, but was also graced by the presence of a former member of *this* Honorable Court, to wit: Mr. Justice Tom Clark, retired, sitting by designation.

2. In General

Appellants also invite attention to the fact that in recent years there has been no dearth of other sex-equality cases decided by three-judge District Courts that have been deemed sufficiently "substantial" to merit the assumption and exercise of appellate jurisdiction by the Supreme Court under 28 U.S.C. 1253, to wit: *Frontiero* v. *Richardson*, 411 U.S. 677, *Geduldig* v. *Aiello*, 417 U.S. 484, *Schlesinger* v. *Ballard*, 419 U.S. 498, and *Weinberger* v. *Wiesenfeld*, _____ U.S. _____, 43 L.Ed.2d 514, 95 S.Ct. 1225. In fact, recent years have witnessed such a growth in the substantiality of the whole sex-equality question as to merit the repeated review thereof by writs of *certiorari*, whether such questions were posed in constitutional terms, see *Reed* v. *Reed* (1971) 404 U.S. 71, *Stanton* v. *Stanton* (1975) _____ U.S. _____, 43 L.Ed.2d 688, 95 S.Ct. 1373, or statutorily, see *Phillips* v. *Martin Marietta Corp.* (1971) 400 U.S. 542; even the periphery of the sex-equality question has claimed the Court's attentions, see *Stanley* v. *Illinois* (1972) 405 U.S. 645, and *Cleveland Board of Education* v. *LaFleur* (1974) 414 U.S. 632.

3. Conflicts With Other Decisions

Certainly the instant case is substantial in terms of its evident conflict with the almost squarely-in-point *Stanton* v. *Stanton*, supra, 95 S.Ct. 1373, rendered shortly before the District Court's decision herein, and with the antecedent *Frontiero* v. *Richardson* (1973) 411 U.S. 677, and *Reed* v. *Reed* (1971) 404 U.S. 71. Nor can the District Court's ruling be justified by its apparent reliance on what are loosely called the Court's "sex-*in*equality" decisions, of *Geduldig* v. *Aiello* (1974) 417 U.S. 484, *Schlesinger* v. *Ballard* (1975) 419 U.S. 498, or *Kahn* v. *Shevin* (1974) 416 U.S. 351. *Geduldig* was not strictly a sex-equality case at all; it dealt with certain anatomical and medical aspects of actual pregnancy, and, as noted by Mr. Justice Stewart, was more properly a differention for actuarial purposes not between males and females, but between pregnant persons and non-pregnant persons, fn. 20, 417 U.S. at 496. Likewise, *Ballard* was *not* a case of discrimination between males and females *similarly* situated, but between male and female Naval officers *not* similarly situated, 95 S.Ct. at 578. *Kahn* comes perhaps the closest to "justifying" discriminations based on sex, but again, there was a limitation therein: that of partial compensation for the effects of past discrimination, not unlike the racially benign "quota" concept, see *DeFunis* v. *Odegaard* (1973) 82 Wash.2d 11, 507 P.2d 1169. But surely the reasoning of *Kahn* is inapplicable to the case at bar, unless we assume that the State Legislature intended to let young women seek in 3.2% beer their solace for past injustices.

The instant case is especially substantial in that, being an *age*-sex discrimination, it not only conflicts with the *Supreme* Court's paradigm pronouncement

thereon in *Stanton* v. *Stanton*, 95 S.Ct. 1373, but with just about every other modern ruling on the same subject as well. See, e.g., *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18; *Patricia A.* v. *City of New York* (1972) 31 N.Y. 2d 83, 286 N.E. 2d 432; *Ex Parte Matthews* (Tex. Cr., 1973) 488 S.W. 2d 434; *Ting* v. *Ping* (N.D., 1973) 209 N.W.2d 624, *Harrigfeld* v. *District Court* (1973) 95 Idaho 540, 511 P.2d 822; and *Phelps* v. *Bing* (1974) 58 Ill.2d 32, 316 N.E.2d 775. In fact, even the *Oklahoma* courts now reject age-sex discriminations as unconstitutional! *Bassett* v. *Bassett* (Okla. App., 1974) 521 P.2d 434, cf. *Dean* v. *Crisp* (Okla. Cr., 1975) 536 P.2d 961. So far as Appellants have discovered, the District Court's ruling is the *only* decision presently extant still upholding the age-sex discrimination concept.

4. The Unsettled Question of The Relevant Test

But the instant case is substantial for a number of original reasons as well. One is the District Court's own admitted uncertainty over what test for unconstitutionality should have been applied to the discrimination at bar — an uncertainty that the District Court viewed as emanating in truth from the *Supreme* Court's failure, at least as yet, to resolve the matter. See pp. A5-A8, A16-A17, and A19, infra. Indeed, in its recent *Stanton* v. *Stanton*, 95 S.Ct. at 1377, 1379, the Honorable Supreme Court *expressly* left undecided the question of whether sexual discriminations are to be reviewed under a "compelling state interest — or rational basis — or something in between" test. Appellants earnestly urge that the prompt resolution of this question *is* a matter of substantial Federal importance, for given the plethora of sex-equality litigation that has arisen in recent years, the continued unsettledness of

what test to apply will only result in the blind groping for varying standards, as evidenced by this case, being repeated and multiplied in scores, even hundreds, of similar lawsuits, to the Public's extreme disadvantage.

And, while Appellants retain their faith that the instant discrimination is unconstitutional under *any* of the possible tests, still, the District Court, while evidently acknowledging its unconstitutionality under the "suspect classification" test, nevertheless upheld it under the "rational relationship" test. *If*, therefore, the District Court's analysis be correct, then this instant case *does* squarely present the "relevant test" question, which is as yet unresolved but which ought to be decided at the earliest opportunity.

5. The Sex-Alcohol "Combination"

Related to the "relevant test" question is the evident sentiment by the District Court that irrespective of whatever that test is or may be, it does not seem to apply with its otherwise force and vigor to sexual discriminations erected in the area of alcoholic beverages, because of the Twenty-First Amendment. Of course, that Amendment, by its own terms, refers only to "*intoxicating* liquors," whereas 3.2% beer is *non*-intoxicating, 37 O.S. 1971, Sections 163.1, 163.2(a).[1] But passing the question of the precise quantum of alcohol required before the Twenty-First Amendment obtains, and recognizing that the District Court did vacillate somewhat on the question of how much the relevant test for sexual and related discriminations is actually to be "diluted" in the realm of intoxicants (see pp. A6, A14-A15, A19, infra), the District Court's "exemption"

[1]Interpreted to mean just exactly that in *State ex rel. Springer* v. *Bliss* (1947) 199 Okla. 198, 185 P.2d 220.

from Equal Protection scrutiny for discriminations regarding alcohol, evidently inferred from the "sex-alcohol" case of *California* v. *LaRue* (1972) 409 U.S. 109, and the famous dictum in *State Board* v. *Young's Market Co.* (1936) 299 U.S. 59, 64,[2] is substantial for two reasons: the short reason being the question it raises, assuming a Twenty-First Amendment tolerance for *sexual* discriminations regarding alcohol, of equally tolerable *racial* (and related) discriminations under the same Amendment (as construed). Certainly *this* conclusion which the District Court apparently inferred from *LaRue* and *Young's Market Co.* demands plenary review. And the second "substantiality" to the District Court's diminished Equal Protection scrutiny for sexual discriminations in alcohol lies again in the fact that, like the unanimously contrary age-sex authorities, discussed supra, page 13, virtually *all* the modern alcoholic-sex-equality cases go directly *contra* to the District Court's conclusion. *Sailer's Inn, Inc.* v. *Kirby* (1971) 5 Cal. 3d 1; 485 P2d 529,[3] *Peterson Tavern & Grill Owners' Assn.* v. *Borough of Hawthorne* (1970) 47 N.J. 180, 270 A.2d 628, *Commonwealth* v. *Burke* (Ky., 1972) 481 S.W.2d 52; and, on the Federal level, *White* v. *Fleming* (E.D.Wisc., 1974) 374 F.Supp. 267, *Daugherty* v. *Daley* (N.D.Ill., 1974) 370 F.Supp. 338 (three-judge court), and *Women's Liberation Union* v. *Israel* (1st Cir., 1975) 512 F.2d 106.

In fact, to find any "authority" to sustain sexual discriminations in the alcoholic context one really must retreat all the way back to such grotesque antiquities as

[2]"A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

[3]From certain language whereof, 485 P.2d at 540, came almost *verbatim* the key language in *Frontiero* v. *Richardson* (1973) 411 U.S. 677, at 686-687!

Goesaert v. *Cleary* (1948) 335 U.S. 464, and *Cronin* v. *Adams* (1904) 192 U.S. 108; and while the District Court prudently avoided any reliance on these cases, the very fact that the instant case *does* involve a sexual discrimination in the context of alcohol means that the Supreme Court is finally presented with its long-awaited opportunity to *squarely overrule Goesaert* and *Cronin* once and for all (as well as to clarify the true scope of *LaRue*).

6. The "Statistics" Issue

We next come to what Appellants submit makes the opinion below not only erroneous and "substantial," but in a sense even a *dangerous* decision: namely, that solely on the basis of "statistics" the fundamental American guarantee of Equal Justice Under Law was rendered wholly nugatory. This Jurisdictional Statement is not, of course, the time or place for a detailed discussion of the Appellees' statistical exhibits adduced at the trial below; but Appellants would submit that *any* employment of "statistics," especially an exclusive employment thereof, as a basis for denying the Equal Protection of the Laws is *per se* "substantial" in a constitutional sense, for, as we all know, virtually *anything* can *somehow* be "proven" with "statistics."

Let us but briefly look at how, in several particulars, "statistics" were employed herein to *sustain* a "permanent irrebuttable presumption of fact", see *Cleveland Board of Education* v. *LaFleur* (1974) 414 U.S. 632, at 643-647, and *Stanley* v. *Illinois* (1972) 405 U.S. 645, at 653-658, that *no* male 18-21 shall be trusted with 3.2% beer, although even the drunkenest of such-aged females may purchase it in unlimited amounts.

a) The "statistics" relied on by the District Court were *arrest*, not *conviction* statistics. In fact, *no* instance of an actual alcoholic *violation* was ever established by *any* of the Defendants' exhibits. And if an *individual* cannot be punished by a mere arrest, may an entire sex be so condemned?

b) The statistics fail to establish the actual *number* of males even *accused* of alcohol-related offenses. That is, taking the State-wide 1973 datum of 1393 arrests, does that "statistic" refer to 1393 males arrested one time apiece, or 139.3 males arrested 10 times apiece? We are not told. It *could* mean no more than that *one* male got arrested 1393 times in 1973.

c) These "statistics" could easily be and undoubtedly were the results of biased or "selective" law-enforcement attitudes and practices, which traditionally have sought out the youthful male offender for harsher treatment than the youthful female offender, see *Lamb* v. *State* (Okla.Cr., 1970) 475 P.2d 829. For example, in the Defendants' Exhibits 1 and 2 there was a *third* category of alcohol-related offenses, "Other," meaning everything that was neither "DWI" nor "Public Drunk." These "Other" offenses included, to some indeterminate degree, "working as a minor in a beer joint" and "possession of beer by a minor," which are *defined* in terms of females under 18 and males under 21. *Naturally* there would be more of these "Other" offenses among 18-21 males than 18-21 females. And although the District Court omitted any reference to these "Other" statistics in its decision, nevertheless, at the trial this very objection thereto was overruled as going merely to the "weakening" of these statistics, not their *admissibility*!

d) The *traffic* accident statistics relied on by the District Court are at best of conjectural relevance. They do indicate more young males than young females injured in traffic accidents, but there is no showing that these accidents were alcohol-related. And *how* could there be any conceivable relevance to the fact that more male *passengers* are injured annually than female passengers? (See p. A10-A11, A30-A31, infra). Even if the age-sex discrimination at bar were, say, 18 for girls and 21 for boys to get *drivers' licenses* (rather than to drink beer), what is proven by more male *injuries* than female? Does "injury" mean "fault?" Rather than a greater male "recklessness," an equally logical explanation of these "data" would be that there are simply more males than females actually on the road. For instance, let us assume that males do 20 times as much driving as females, and have 10 times as many accidents as females. A skillful "statistics" manipulator could 'truthfully' testify *either* way in an Equal Protection lawsuit: either than men are ten times more reckless than women, or that women are twice as reckless as men.

e) Taking this just-cited hypothetical as an example, we come to the essential ambivalence in *this* case. That is, even accepting the statistics herein at their worst, we see that in Oklahoma in 1973 there were 1393 arrests for alcohol-related offenses (427 DWI plus 966 Public Drunk) for 18-21 year old males, and 126 such arrests (24 DWI and 102 Public Drunk) for like-aged girls. But there were also 69,688 18-21 year old boys in Oklahoma at the time, and 68,507 girls. Thus, if we view *only* these 18-21 year olds actually arrested for alcohol, the male-to-female ratio is about 11 to 1, which satisfied the District Court. But taking these identical statistics, we see that the male-female *non*-arrest rate is essentially *equal* (98.00% vs. 99.82%).

A second hypothetical example might clarify the point. In a racially mixed community of 100,000 Caucasians and 100,000 Negroes, let us assume that in some particular year 10 Caucasians and 100 Negroes are *arrested* for "vagrancy." Assuming that "control of shiftlessness" is deemed a legislatively permissible goal for some statutory discrimination, which "statistic" would govern in a Federal anti-discrimination lawsuit: the "datum" that the Negro "shiftlessness" rate is fully *ten times* that of the Caucasians? Or, that the Black-White *non*-shiftlessness ratios are essentially *equal*?

Without arguing in this Jurisdictional Statement which view is the correct one for Federal Judges to take in Equal Protection cases, Appellants would nevertheless submit as "substantial" their challenge to the District Court's assumption that Equality is to be granted or withheld according to the tribunal's capricious decision to disregard the essential alcoholic equality-in-fact between the two sexes *as a whole*, and instead to concentrate only upon that tiny minority within *both* sexes displaying the problem, and then letting some percentage differential within that atypical, anomolous minority dictate Equality vel non for the other 99 or so percent of the population. See *Cleveland Board of Education* v. *LaFleur*, supra; *Stanley* v. *Illinois*, supra; cf. *Leary* v. *United States* (1969) 395 U.S. 6, at 32-54.

In other words, since in the record at bar we have a graphic and glaring example of how the misuse of nebulous, meaningless, and highly contradictory "statistics" can render the Equal Protection Clause absolutely nugatory, the instant case presents an excellent vehicle for the Supreme Court to establish appropriate guidelines and safeguards for the judicial employment of statistical data in this and future sexual (or racial,

religious, class) discrimination lawsuits. [If, indeed, "statistics" to "prove" some group's "inferiority" are Federally cognizable at all. Recall the fate of the "statistics" attempt to "overrule" *Brown* v. *Board of Education*, 347 U.S. 843, in *Stell* v. *Savannah-Chatham Co. Bd. of Educ.* (S.D.Ga., 1963) 220 F.Supp. 667, reversed 333 F.2d 55, at 60-61 (5th Cir., 1964) cert. den. sub. nom. *Roberts* v. *Stell*, 379 U.S. 933, "restatisticked" 255 F.Supp. 83, 88 (1966), and reversed again 387 F.2d 486, 489-490; and *Jackson Municipal Separate Sch. Dist.* v. *Evers* (5th Cir., 1966) 357 F.2d 653, cert. den. 384 U.S. 961, rejecting a similar "statistics" approach.]

6. The Ultimate Sex-Equality Question

Finally, and although the Appellants view the "statistics" at bar as wholly incompetent under all theories of law to prove or disprove anything about the characteristics of either of the two sexes involved in this lawsuit, there still remains a sex-equality question as yet untouched by the Court in any case to date — that being, even if there *be* some true behavioural differentiation between the sexes, in a general if not a strictly individual sense, does not Equal Protection still apply anyway between male and female Americans? For instance, let us assume that at some future time it *be* completely established, as with better microscopes, chemical sensors, or the like, that the "old notions" of, say, masculine "aggressiveness" and feminine "passivity," and related "facts of life," *do* in truth have an organic or biological basis, that males and females *are* behaviourally different innately, and that the two sexes are not completely "equal" in their various capacities and competences. If this should ever be competently proven, what *then* of Equality under the American Constitution? So far the sex-equality cases

have studiously avoided confronting this "ultimate" sex-equality question, and have instead preferred to perceive no "essential" differences between men and women for the purposes of a particular discrimination in issue, or when denying equality, have tended to do so on the basis of some overtly physical, not on a behavioural or subtly biochemical, basis. So to take our present case as an example, would the District Court's decision be correct if there actually *were* some competently demonstrable male inferiority with respect to alcohol? Or does not that Equality proclaimed by the Declaration of Independence as well as guaranteed by the Fourteenth Amendment, which surely obtains notwithstanding *individual* inequalities-in-fact, also obtain despite various *collective* inequalities-in-fact?

As stated, most cases so far have striven to avoid this "ultimate" sex-equality question; though yet unanswered, however, it has not gone wholly unnoticed:

> "...an individual female cannot constitutionally be given more severe sentencing treatment for the same offense than that by law accorded males as a class on the basis of any characteristics thought *or even proved* to be applicable to females generally, or as to most of them.
>
> "I would therefore join in the decision of the court *even if the record here justified the factual conclusion* that most female offenders, or female offenders generally, are better subjects for rehabilitation than males, or less recidivist, or that a longer period of detention would promote the chances for rehabilitation of female offenders generally as opposed to male offenders generally."

Conford, J., concurring specially in *State* v. *Chambers* (1973) 63 N.J. 287, 307 A.2d 78, at 85 (emphasis added).

Therefore, *if* the Court should feel that the statistics admitted into the instant record *do* competently establish some degree of actual male inferiority with respect to alcohol, *then* this case poses the "ultimate" question of whether or not American Equality governs *anyway* — not only a "substantial" but also a most fitting Bicentennial question for our Highest Court to answer.

CONCLUSION

Had the decision herein sustained, under *any* theory of law or "statistical showing," an age-*racial* discrimination like that at bar, of allowing Caucasians to purchase 3.2% beer at age 18 while prohibiting Negroes therefrom till age 21, or had it sustained an age-*religious* discrimination, allowing Protestants beer at 18 while keeping Catholics therefrom till 21, the question would not be that of "substantiality," but simply, whether the *error* therein could be deemed so beyond dispute as to merit summary reversal by memorandum order rather than by plenary review with formal briefs and oral argument. Appellants submit that law, logic, and Constitution require no less for the instant age-*sex* discrimination.

If, on the other hand, there be deemed something mystically different about *sexual* discriminations such as to suggest a sentiment that the instant age-sex decision might *not* merit the same summary reversal as a like age-racial or age-religious validation, then this case is *per se* sufficiently substantial to find out *why* not.

Appellants therefore pray that the decision below be summarily reversed on the strength of *Stanton* v. *Stanton*, *Frontiero* v. *Richardson*, and similar cases; or, in the alternative, that the Court note probable jurisdiction over this appeal, and accept same for plenary review.

Respectfully submitted,

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Attorney for Appellants

CERTIFICATE OF SERVICE

I, Frederick P. Gilbert, a member of the Bar of this Honorable Court and counsel of record for the Appellants herein, do hereby certify that I served three copies of this Jurisdictional Statement upon counsel for all Appellees herein, to wit: upon the Hon. Larry Derryberry, Attorney General of the State of Oklahoma, by mailing same to him at his office in the State Capitol Building, Oklahoma City, Oklahoma, Attn: Mr. James Gray, Assistant Attorney General, this 24th day of October, 1975, with first class postage thereon fully prepaid.

In the sense of Supreme Court Rules 10(4) and 48(3), I further certify that the previous Defendants herein not now named as Appellants have no further interest, personal or otherwise, in this litigation; but that in any event their counsel was and would continue to be the Attorney General of Oklahoma, upon whom service is being made as certified in the preceding paragraph.

All Parties required to be served have been served.

FREDERICK P. GILBERT
Attorney for Appellants

APPENDICES

A. THE DECISION BELOW

B. THE JUDGMENT BELOW

C. THE ORDER OVERRULING MOTION FOR NEW TRIAL

D. THE NOTICE OF APPEAL

E. THE SINGLE-JUDGE'S PREVIOUS RULE 12[B][6] DISMISSAL

F. THE TENTH CIRCUIT'S ADJUDICATION OF SUBSTANTIALITY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

MAY 17, 1975

REX B. HAWKS
CLERK, UNITED STATES
DISTRICT COURT
By /s/ VERA EDDLEMAN
DEPUTY

NO. CIV-72-867

MARK WALKER, CURTIS CRAIG,
AND CAROLYN WHITENER, d/b/a
The Honk and Holler,
Plaintiffs,

v.

HONORABLE DAVID HALL, Governor, State of Oklahoma; HONORABLE LARRY DERRYBERRY, Attorney General, State of Oklahoma; D. M. BERRY, Chairman; LAWTON L. LEININGER, Vice-Chairman; J. L. Merrill, Secretary-Member, Oklahoma Tax Commission, State of Oklahoma; ROBERT L. HERT, Presiding District Judge, Ninth Judicial District, State of Oklahoma; CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma; ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma; FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma; and HOWARD W. HOYT, Chief of Police, City of Stillwater, Oklahoma,
Defendants.

Fred P. Gilbert, Attorney, Tulsa, Oklahoma,
for Plaintiffs

Steven E. Moore, James R. Barnett and James H. Gray, Assistant Attorneys General, State of Oklahoma
(Honorable Larry Derryberry, Attorney General,
State of Oklahoma, on the brief)
for Defendants

Before HOLLOWAY, Circuit Judge; DAUGHERTY, Chief Judge, Western District of Oklahoma, and Eubanks, District Judge, Western District of Oklahoma.

HOLLOWAY, Circuit Judge

MEMORANDUM OPINION

Plaintiffs Mark Walker and Curtis Craig, young males wishing to purchase 3.2% beer, and Carolyn Whitener, a licensed beer vendor, [1] seek declaratory and injunctive relief against the defendant State officials to prevent enforcement of certain provisions of Oklahoma law regulating the sale of 3.2% beer. 37 O.S.A. §§241-245. Specifically, plaintiffs challenge the constitutionality under the Fourteenth Amendment to the Federal Constitution of those provisions of the statutes that prohibit sale to males 18 through 20 years of age of 3.2% beer, while allowing such sale to females of the same ages, as applied to such sales for consumption off the premises of the vendor.[2]

Relief is sought in this suit under 42 USCA §1983 and federal jurisdiction is claimed pursuant to 28 USCA

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[1]The claim of plaintiff Walker, as an affected male, is moot since he is now 21 years of age. However, prior to trial a new party plaintiff, Curtis Craig, was added. His date of birth was alleged as September 25, 1955, and it was further averred that he has attempted on numerous occasions to purchase 3.2% beer but has been unable to do so because of the statutory restrictions. He is thus still affected by the statutes so that his claim is not moot.

Plaintiff Whitener is a licensed vendor of 3.2% beer who desires to sell beer to males in the 18 to 20 year age group. It is alleged, and admitted by the defendants, that plaintiff Whitener fails and refuses to make such sales of beer because of the coercive and intimidating effect of past, present and threatened enforcement of the statutes in question and their criminal and administrative sanctions.

No challenge is made to the standing and requisite interest in the controversy of plaintiffs Craig and Whitener, and we are satisfied that their standing and their requisite interest for justiciability are sufficient.

[2]Vendors of "non-intoxicating beverages," which are defined to include 3.2% beer, are required to be licensed for sale of such products for consumption on or off the premises. 37 O.S.A. §§ 163.7 and 163.11. The statutes directly in question here are 37 O.S.A. §§ 241 and 245. § 245 provides as follows:

> § 245. *"Minor defined"*
> A 'minor' for the purposes of Sections 241 and 243 of Title 37 of the Oklahoma Statutes, is defined as a female under the age of eighteen (18) years and a male under the age of twenty-one (21) years.

Section 241 provides:

> §241. *"Sale, barter or gift to minor unlawful"*
> It shall be unlawful for any person who holds a license to sell and dispense beer and/or any agent, servant, or employee of said license holder to sell, barter or give to any minor any beverage containing more than one-half of one per cent alcohol measured by volume and not more than three and two-tenths (3.2) per cent of alcohol measured by weight. Provided, a parent as regards his own child or children, is excepted from the provisions of this Act.

Since 1933, Oklahoma has classified alcoholic beverages as "intoxicating" and "nonintoxicating" and has regulated them separately. Beverages containing more than three and two-tenths percent (3.2%) alcohol by weight are declared to be intoxicating. 37 O.S.A. §163.1. Prior to 1959, intoxicating alcoholic beverages were generally prohibited. Since 1959, intoxicating alcoholic beverages have been regulated under 37 O.S.A. §501, *et seq.* The sale of intoxicating alcoholic beverages is presently prohibited to any person under 21 years of age. 37 O.S.A. §537 (a)(1).

"Nonintoxicating" alcoholic beverages are those beverages containing less than one-half of one percent alcohol by volume and less than 3.2% alcohol by weight. 37 O.S.A. § 163.1. This category is primarily, if not exclusively, composed of 3.2% beer. Nonintoxicating alcoholic beverages are regulated under 37 O.S.A. § 163.1, *et seq.* Since 1953, sale of such beverages to "any minor" has been prohibited. 37 O.S.A. § 241.

(Fn. 2 continued)

§§1343 and 2201. We conclude we have jurisdiction under the jurisdictional grant in §1343. This three-judge court was convened pursuant to 28 USCA §2281. See *Walker* v. *Hall*, No. 73-1267 (10th Cir.), decided October 23, 1973 (unpublished).

After scrutiny of the Oklahoma statutes in question, called for by the sexual classification made, for the reasons outlined below we hold that a rational legislative judgment was made in the alcoholic beverage regulation in question. Regardless of whether the challenges to the law may show it unwise—an argument that is for the legislature—we cannot say the attacks on the law have established that it violates the Federal Constitution.

We uphold the Oklahoma statutes in question for three main reasons: (1) in this case, unlike some others in which the Supreme Court and other courts have invalidated sex-based classifications, proof was made in which we find a rational basis for the legislative judgment underlying the challenged classification; (2) the classification here is directly related to apparent legislative objectives, looking to protection of the persons affected and the public; and (3) the statutes in question

(Fn. 2 continued)

Prior to 1972, a minor in Oklahoma was defined as a male under twenty-one years of age or a female under eighteen years of age. This variation in ages was equalized for most purposes in 1972 with the enactment of 15 O.S.A. § 13:

> Minors, except as otherwise provided by law, are persons under eighteen (18) years of age.

The legislature, did not, however, extend this equalization to the purchase of "nonintoxicating" alcoholic beverages. Along with §13 of Title 15, the legislature enacted 37 O.S.A. § 245, which maintains the old definition of minor for the purposes of §§ 241 and 243 of Title 37. Laws 1972, c. 221, § 9, effective August 1, 1972.

concern the regulation of alcoholic beverages—an area where the States' police powers are strengthened by the Twenty-first Amendment.

The arguments and proof of the parties and our findings are detailed below. This opinion shall constitute the findings of fact and conclusions of law of this court required by Rule 52 of the Federal Rules of Civil Procedure.

I

At the outset we are faced with the recurring problem of the proper standard of review to apply in considering a federal constitutional challenge to a sex-based classification.

The plaintiffs argue that sex is an inherently suspect classification requiring strict scrutiny, so that the defendants are burdened with showing that the classification is necessary to the attainment of a compelling state interest, and that there are no less drastic alternatives to subserve the governmental interest (Brief of Plaintiffs 6-9). They rely on *Frontiero* v. *Richardson*, 411 U.S. 677; *Reed* v. *Reed*, 404 U.S. 71; *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir.); and *Bassett* v. *Bassett*, 521 P.2d 434 (Okla. App.), among other cases.

Defendants argue that the sale, purchase or trade in intoxicants is not a fundamental right; that the State has extraordinary power over the regulation of intoxicants; and that the traditional equal protection test is the proper one to apply here, under which a classification will be upheld if the statutory goals are legitimate and the classification rests on grounds bearing a rational relationship to the statute's objective. They rely on the standard laid down on *Danridge* v. *Williams*, 397 U.S. 471; and *McGowan* v. *Maryland*, 366 U.S. 420 (Brief of Defendants 3-4).

Prior to trial, the court considered one aspect of the problem. We advised the parties that, from a consideration of pertinent cases, the burden of proof rested on the defendants, and that the parties would proceed accordingly at trial. We did not feel required at that time to decide what constitutional standard should apply, it being sufficient then to designate the procedural order for the trial. However, now we must determine the standard to which the Constitution and Supreme Court decisions point. We are not persuaded that the position taken by either party furnishes the answer.

First, we feel the fact that the attack here is on an alcoholic beverage regulation, buttressed by the Twenty-first Amendment, does not call for the use of a less stringent equal protection standard than would otherwise apply, although we feel that this circumstance is to be weighed in our decision. The Supreme Court has recognized that its decisions do not go so far as to hold or say that the Twenty-first Amendment supersedes all other constitutional provisions in the area of liquor regulations. *California* v. *LaRue*, 409 U.S. 109, 115. See also *Hostetter* v. *Idlewild Liquor Corporation*, 377 U.S. 324, 332; *Women's Liberation Union of Rhode Island* v. *Israel*, ___ F.2d ___ (1st Cir. 3/4/75). The demands of the Equal Protection Clause still apply, and the standards of revie that it mandates are not relaxed.

We feel that *Reed* v. *Reed*, 404 U.S. 71, provides the applicable test here. In *Reed* the Court stated, 404 U.S. at 75-76:

> In such situations, §15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (citations omitted) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

Last Term the Court applied the *Reed* test in *Kahn* v. *Shevin*, 416 U. S. 351, 355, in upholding a sex-based classification in a State tax exemption statute. The Court made no reference to the compelling state interest test, despite a vigorous dissent arguing that it applied. And, in fact, the Court observed that "[g]ender has never been rejected as an impermissible classification in all instances." Id. at 356 n. 10.

Moreover, we now have the recent decisions of the Supreme Court in *Stanton* v. *Stanton*, _____ U.S. _____, 43 U.S.L.W. 4449; *Weinberger* v. *Wiesenfeld*, _____ U.S. _____, 43 U.S.L.W. 4393; and *Schlesinger* v. *Ballard*, _____ U. S. _____, 43 U.S.L.W. 4158, as further guidance. While these decisions formulate no new test, they at least demonstrate that the Court has not yet required the showing of a compelling

governmental interest to sustain sex-based classifications.[3] Nor do they indicate a departure from the *Reed* test. We feel we should not impose a more stringent standard for judging the validity of such classifications, in view of the Supreme Court's obvious failure to do so. Hence we apply the *Reed* test.

We do not feel it clear under *Reed* that the ordinary presumptions favoring the validity of state statutes do not fully apply where a sex-based classification is made. Nor does it suffice, we believe, that some state of facts may be conceived by the court that might justify the classification. Compare *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802, 809. Instead we feel the justification for the sex-based classification must be demonstrated by the State. *Lamb* v. *Brown*, 456 F.2d 18, 20 (10th Cir.). Accordingly we have placed the burden of proof on the defendants in our case. We turn now to the evidence they offered in support of the statutory classification, and to the plaintiffs' evidence.

II

The principal proof offered by the defendants to support the rationality of the sex-based classification made by 37 O.S.A. §§ 241 and 245 was some eight exhibits:

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[3]We recognize the dictum in *Duncan* v. *General Motors Corp.*, 499 F.2d 835 (10th Cir.), that the rationality test applied in *Reed* v. *Reed* appears no longer applicable. Id. at 838. The *Duncan* opinion pointed to the plurality opinion in *Frontiero* v. *Richardson*, *supra*. However, the subsequent decisions of the Supreme Court, see *Stanton* v. *Stanton*, *supra*, and other recent cases cited, recognize a higher standard has not yet been imposed by the Court. As stated, we feel we need only follow the formulation of the test set out in *Reed*. See *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir.); *Moritz* v. *Commissioner*, 469 F.2d. 466 (10th Cir.), cert. denied, 412 U.S. 906.

Defendants' Exhibit 1 (see Appendix I hereto) is an extract of data compiled by the Oklahoma State Bureau of Investigation from figures submitted by 194 police and sheriff's departments in Oklahoma, showing a breakdown by age and sex of persons arrested in Oklahoma for alcohol related offenses in the last four months of '973. For the offense of driving under the influence, 427 males in the 18-20 year age group were arrested, as opposed to 24 females. Of the total number of persons of all ages arrested for driving under the influence, 5400 were male and 499 were female. Of those arrested for drunkenness in the 18-20 year age group, 966 were male and 102 were female. However the comparable figures for all ages were 14,713 males and 1,278 females, indicating even more male involvement in such arrests at later ages.

Defendants' Exhibit 2 (see Appendix I hereto) reflects the total number of persons arrested for various crimes by the Oklahoma City Police Department in 1973. For the offense of driving under the influence, 82% of the 18 year olds were male; 98% of the 19 year olds were male; and 94% of the 20 year olds were male. The corresponding percentages for the 21 year old group was 96% male, and for all ages was 92% males.

Defendants' Exhibit 3 (see Appendix I hereto) compiles the results of a random roadside survey of drivers conducted at 19 locations in all quadrants of Oklahoma City during the evening hours in August of 1972 and 1973. In 1972, 78% of the randomly selected drivers under 20 were male. Of this under-20 age group, 84% of the males stated that their drink preference was beer, as opposed to 77% of the females. 16.5% of the males in this age group stated that they had consumed alcoholic beverages within the last two hours

prior to interview, as opposed to 11.4% of the females. 14.6% of the males in this age group had a blood alcohol concentration (BAC) greater than .01%, as opposed to 11.5% of the females. Of those drivers under 20 who had a BAC of greater than .01%, 29.7% of the males and 14.3% of the females had a BAC equal to, or greater than, .05%.

Comparable 1972 figures for drivers of all ages are as follows: 76% of the males and 54% of the females stated their drink preference as beer. 21.2% of the males and 14.1% of the females stated that they had consumed alcoholic beverages within the last two hours. 17.5% of the males and 10.8% of the females had a BAC of greater than .01%. Of those with a BAC of greater than .01%, 51.2% of the males and 36.8% of the females had a BAC equal to, or greater than, .05%.

The 1973 figures, although they contain some variations, reflect essentially the same pattern. In the under-20 age group, a greater percentage of males than females preferred beer, had consumed an alcoholic beverage within the last two hours, and had a significant BAC. As compared to all drivers interviewed, however, the under-20 age group generally showed a lower involvement with alcohol in terms of having drunk within the past two hours or having a significant BAC.

Defendants' Exhibits 4 and 5 are official summaries of motor vehicle traffic collisions in Oklahoma for 1972 and 1973. They show that of all persons killed or injured in motor vehicle collisions, and particularly among drivers, the age group between 17 and 21 suffered the greatest number killed and injured. They further show that the number of males killed and injured in this age group — whether driver or otherwise — exceeded

the number of females (this was generally true for other age groups as well), and that the number of deaths and injuries in the 17-21 age group increased from 1972 to 1973. These statistics did not show the levels of intoxication, if any, of those killed and injured in the 17-21 or other age groups (see Appendix I hereto).

Defendants' Exhibit 6 is an FBI report showing that over the years 1967-72 there had been a nationwide increase of 96% in the number of arrests for driving under the influence, for all ages.

Defendants' Exhibit 7 is a report by the Minnesota Department of Public Safety that shows driver fatalities as a function of blood alcohol concentration, sex and age, offered for the sole purpose of showing that Oklahoma statistics are in line with those of other states.

Defendants' Exhibit 8 is a report on a Joint Conference on Alcohol Abuse and Alcoholism (sponsored by the Departments of Justice, Transportation, and Health, Education and Welfare), referring to a Michigan study of the use of alcohol by persons involved in automobile collisions. Among the points made in the summary and conclusions of that study, the following are particularly relevant:

> Young drivers are not involved in more collisions than older drivers because of the use of alcohol. . . .
>
> In spite of the less significant role of alcohol in highway crashes involving youth, there is an important relationship of alcohol to youth-involvement in collisions which sharply differentiates them from the other age categories up to age 69. This concerns the impact of small amounts of alcohol; i.e., those resulting in

BAC's which are positive but less than 0.05 percent. Among teenagers such low concentrations are an important component in crashes, whereas in all other groups up to age 69 such concentrations are of no significance at all. There is evidence that drivers under 18, who already have the worst collision-vulnerability ratio with nothing to drink, increase that vulnerability threefold after just one or two drinks. At that level (0.01-0.04 percent BAC) all age groups between 25 and 69 appeared in collisions less often than in the control.

. . .

Finally, we cannot blithely explain away a major part of the fatal crash problem among youth and dismiss the remainder as "expected." The fact remains that thousands of young drivers die each year and a substantial number of these unnecessary deaths are related to some use of alcohol.

In response the plaintiffs offered evidence of their own. Their proof consisted primarily of the testimony of two expert witnesses, a psychiatrist and a research psychologist. The psychiatrist testified that, in his opinion, there was no rational justification for the challenged statutory sex classification from a biological, sociological or psychiatric standpoint (Tr. 63-64). He rejected as a "folk myth" the notion of females maturing faster psychologically than males (Tr. 57-58, 70). However, he said it was his impression that males in the 18-20 year age bracket seem to have a greater interest in experimenting with alcohol than females of those ages (Tr. 58-59, 73-74), and that males do tend to use alcohol more readily, and more readily to the point of it being an identifiable abuse (Tr. 94). But he added that this disparity in use and abuse between

males and females extended across all ages and was not confined to the 18-21 year age period, so that to the extent any exclusion by sex was justified, it should be extended to all males (Tr. 94-95).

In addition, plaintiffs offered several exhibits. One exhibit consisted of 1970 federal census data on Oklahoma showing *inter alia*, the total male population in the 18-20 age bracket. This was used as a premise for the argument that defendants' statistics, at best, showed a male alcohol problem which affects so "microscopically slight" a percentage of the total relevant male population as to be virtually *de minimis* from an overall statistical view. (See Brief of Plaintiffs at 37-43, 46). Another exhibit was an Oklahoma study done by the psychologist who testified for plaintiffs. Its conclusions indicated that females were physically no more able, and in some instances were less able, than males to handle comparable alcohol dosages.

III

While the data and testimony are subject to several criticisms, which we recognize,[4] in examining the validity of the statute we are not dealing with proof of absolutes by a particular calculus, nor with proof of the elements of a given legal claim. Instead we are concerned with the broader question whether the proof sufficiently shows a rational basis for the legislative judgment.

---

[4]We realize that part of the data covers periods following enactment of the statute and that the statistical data are subject to various criticisms. Nevertheless, we feel the data are admissible in determining whether a rational basis exists for the classification. We feel that the facts that some proof covered periods after enactment of the statute, and that some statistics were based on surveys of only small percentages of the population, or may be otherwise imperfect, go to the weight of the proof only. Despite these these limitations, we find in the proof a sufficient rational basis for the sex-based classification.

With this in mind, we find in the record sufficient support of the rationality of the limited sex-based classification in question under the *Reed* test. We find such support in the record data indicating more likely consumption of beer by males in the 18-20 age group; more driving in this age group by males with significant BAC levels than by females; the greater number of vehicle injuries in the younger male group; and the apparent relationship of such injuries to alcohol use.[5] We conclude that the classification made has a fair and substantial relation to apparent objectives of the legislation for the protection of those affected and the public generally.[6]

The defendants argue that we should also consider the State's authority to regulate alcoholic beverages as strengthened by the Twenty-first Amendment, and we agree. In addition to their long-standing regulatory power under which the States were competent to prohibit the manufacture, sale or transportation of intoxicating liquors, see *Barbour* v. *Georgia*, 249 U. S. 454; *Mugler* v. *Kansas*, 123 U. S. 623, the authority

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[5]As stated in Part II, supra, the point was raised by the testimony of one of plaintiffs' expert witnesses that the larger male involvement in alcoholic beverage violations extended through older age groups. However, the plaintiffs have not attacked the disparity in treatment of those over and under 21, as such. Their only challenge to the statutory scheme is against the sex-based classification within the 18-20 age group.

Moreover, insofar as the classification affects only the 18-20 age bracket, we note that generally a legislature may address one phase of a problem neglecting the others. See *Jefferson* v. *Hackney*, 406 U.S. 535, 546.

[6]We have no legislative history materials to reveal what the actual purpose of the legislature was. Nevertheless, on consideration of the proof of the State defendants, we feel it apparent that a major purpose of the legislature was to promote the safety of the young persons affected and the public generally.

of the States in this area is reinforced by the Twenty-first Amendment. *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 62. However, as we noted earlier, the Court has recognized that the decisions do not go so far as to hold or say that the Amendment supersedes all other provisions of the Constitution. *California* v. *LaRue*, 409 U. S. 109, 115; and see *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 330; *Women's Liberation Union of Rhode Island* v. *Israel*, _____ F.2d _____ (1st Cir. 3/4/75).

Nevertheless "...the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment...", *California* v. *LaRue*, *supra* at 115, and it is proper that we take into account this "broad constitutional power..." See *Schlesinger* v. *Ballard*, _____ U. S. _____, _____ (Slip opinion 12). In conjunction with the basis for the classification which we find in the proof, we feel the special State regulatory power over alcoholic beverages strengthens the State's case that its statutory classification is valid.

We must consider with special care the recent decision in *Stanton* v. *Stanton*, _____ U. S. _____, 43 U.S.L.W. 4449. The Court held that a Utah law providing generally that the period of minority for males extends to age 21 and for females to 18, "in the context of child support, does not survive an equal protection attack." Id. at _____ (slip opinion 10).

The Utah trial court had held that this provision justified a divorced father in ceasing payments for his daughter's support when she became 18. The Supreme Court of Utah affirmed, rejecting an equal protection challenge to the sex-based classification. As justification for the classification, the Utah Court observed that some

"old notions" continue to prevail, namely that generally it is the man's primary responsibility to provide a home and its essentials for the family; that despite exceptions, it is salutary for him to have a good education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females generally tend to marry earlier than males. 517 P. 2d at 1012.

The Supreme Court reversed, stating (slip opinion 7-8, 10):

> Notwithstanding the "old notions" to which the Utah court referred, we perceive nothing rational in the distinction drawn by [the statutory provision] which, when related to the divorce decree, results in the [father's] liability for support for [his daughter] only to age 18 but for [his son] to age 21. This imposes "criteria wholly unrelated to the objective of that statute." A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. ...If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed. And if any weight remains in this day in the claim of earlier maturity of the female, with a concomitant inference of absence of need for support beyond 18, we fail to perceive its unquestioned truth or its significance,

> particularly when marriage, as the statute provides, terminates minority for a person of either sex.
>
> * * *
>
> We therefore conclude that under any test — compelling state interest, or rational basis, or something in between — § 15-2-1, in the context of child support, does not survive an equal protection attack. In that context, no valid distinction between male and female may be drawn.

We view our case as different from that before the Supreme Court in *Stanton*. The justification offered here for the statutory classification is not based on any "old notions," or on archaic or overbroad generalizations not tolerated under the Constitution. Compare *Stanton*, *supra* at _____ (slip opinion 7-8); *Schlesinger* v. *Ballard*, _____ U. S. _____, 43 U.S.L.W. 4158 (slip opinion 10); *Weinberger* v. *Wiesenfeld*, _____ U. S. _____, 43 U.S.L.W. 4393 (slip opinion 7).[7] Instead, specific and relevant proof was submitted in which we find a rational basis for the statutory classification under the *Reed* test.

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[7]We do not rely on any notions of earlier female maturation, which the expert testimony here rejected, cf. *Stanton* v. *Stanton*, *supra* at _____ (slip opinion 7-8); *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir.), or on similar assumptions.

We also note that the classification in question is not part of a statutory pattern based on overbroad generalizations by which younger males are generally treated differently than females. For most purposes Oklahoma equalized the treatment of males and females in 1972, at the same time that it enacted the statutes challenged here, by providing that all persons under 18 are minors, except as otherwise provided. 15 O.S.A. §13. And in connection with "intoxicating" alcoholic beverages, sale is prohibited to all persons, male and femals, under 21. 37 O.S.A. §537(a)(1).

In sum, we find in the proof a rational basis for the classification, resting on a ground of difference having a fair and substantial relation to apparent objectives of the legislation, sufficient to sustain the statutes.

IV

Plaintiffs further attack the statutory classification on the basis that it erects an unconstitutional irrebuttable presumption. They argue that, even giving defendants' statistics their broadest interpretation, there is no basis for condemning all males of the 18-20 age group since only a minute fraction was shown by the data to present any special danger. They say that to categorize the entire sex on this basis erects a permanent irrebuttable presumption based on a "sex sterotype" that is no longer tolerable, relying on *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, *Vlandis* v. *Kline*, 412 U. S. 441, and similar cases.

We cannot agree. In *Vlandis*, the court defined the constitutional principle limiting irrebuttable presumptions in the following terms, id. at 452:

> "...it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, *and when the State has reasonable alternative means of making the crucial determination.* Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates..." (Emphasis added).

Reliance on such cases is misplaced. They concerned statutes which, in effect, indelibly labelled given individuals to their prejudice, see also *Bell* v. *Burson*, 402 U. S. 535; they did not involve statutes which provide general regulation of group conduct in advance, as here. Further, those cases involved no problem related to a large population group and a regulatory policy that was not amenable to individualized determinations. In contrast, here the plaintiffs' 1970 census data shows some 69,688 males in Oklahoma in the 18-20 age group (Plaintiffs' Ex. 2). We are satisfied that the problem before the legislature here was not one where there was a reasonable alternative means of making the crucial determination. *Vlandis* v. *Kline*, *supra* at 452.

Moreover, the reinforcement of the State's authority by the Twenty-first Amendment is relevant once again. *California* v. *LaRue*, 409 U. S. 109, 115. This is a regulatory field where the State has considerable latitude, as was the case in *Dandridge* v. *Williams*, 397 U. S. 471, 478. Hence, if a classification has a sufficient rational basis, it does not offend the Constitution simply because it is not made with mathematical nicety or results in some inequality. Id. at 485; see also *Kahn* v. *Shevin*, 416 U. S. 351, 355-56 & n. 10.

V

While the case is not free from doubt, we conclude that we should uphold the statutes. We are unpersuaded that the classification violates constitutional principles barring irrebuttable presumptions. Nor are we persuaded by the equal protection challenge. We have subjected the sex-based classification to scrutiny and have required the State defendants to come forward with justification for it. On consideration of the proof,

we find that the record supports the classification as reasonable, not arbitrary, one resting on a ground of difference having a fair and substantial relation to apparent objectives of the legislation. *Reed* v. *Reed*, 404 U. S. 71, 76; *Kahn* v. *Shevin*, 416 U. S. 351, 355. The issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the legislature are within constitutional limitations. Id. at 356, n. 10. We feel that they are.

Accordingly we are entering judgment upholding the statutes and dismissing the action.

/s/ William J. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

/s/ Fred Daugherty
Fred Daugherty, Chief Judge
Western District of Oklahoma

/s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

APPENDIX

Page

Defendants' Exhibit 1 i

Defendants' Exhibit 2 ii

Defendants' Exhibit 3 iii
(w/attachments iii-a through iii-e)

Defendants' Exhibit 4 iv

Defendants' Exhibit 5 v

DEFENDANTS' EXHIBIT 1

PERSONS ARRESTED BY AGE AND SEX FOR THE MONTHS

SEPTEMBER, OCTOBER, NOVEMBER, AND DECEMBER, 1973

IN THE STATE OF OKLAHOMA FOR ALCOHOL RELATED OFFENSES

		18 yrs.	19 yrs.	20 yrs.	Total Persons Arrested 18 - 65 and over
DRIVING UNDER THE INFLUENCE	Male	152	107	168	5,400
	Female	14	2	8	499
DRUNKENNESS	Male	340	321	305	14,713
	Female	39	33	30	1,278

The information contained in this report is summarized crime statistical data compiled from sixty-four (64) Sheriff's Departments and one hundred thirty (130) Police Departments in the State of Oklahoma - 84% population coverage -

(EXCERPT FROM DEFENDANTS' EXHIBIT 1)

DEFENDANTS' EXHIBIT 2

OKLAHOMA CITY POLICE DEPARTMENT
ARREST STATISTICS FOR THE YEAR 1973

Includes those released without having been formally charged.

CLASSIFICATION OF OFFENSES	SEX	AGE 18 yrs.	19 yrs.	20 yrs.	TOTAL For All Ages
DRIVING UNDER THE INFLUENCE	Male	47	54	72	3,206
	Female	10	1	5	279
DRUNKENNESS	Male	102	104	96	9,413
	Female	18	22	19	823

(EXCERPT FROM DEFENDANTS' EXHIBIT 2)

BEST COPY AVAILABLE

DEFENDANTS' EXHIBIT 3

OMEC, Inc.

MANAGEMENT AND ENGINEERING CONSULTING - APPLIED AND BASIC RESEARCH

December 15, 1973

The conditions for the surveys were as follows:

1. Only drivers of passenger cars, pickup trucks and an occasional motorcycle (less than 10 in 1973, none in 1972) were asked to participate.

2. Drivers were selected at random from vehicles actually in operation on the streets and highways of Oklahoma City.

3. The surveys took place during the month of August in 1972 and 1973.

4. Interviews with drivers were accomplished at nineteen different locations covering all quadrants of Oklahoma City between the hours of 6:00 p.m. - 10:00 p.m. and 11:00 p.m. - 3:00 a.m. on all seven days of the week.

5. Approximately 6 to 7 percent of those asked to participate refused to do so. These appeared to be scattered randomly over all age-sex-race groups in the population of interest, namely drivers of the motor vehicles mentioned in 1., above.

6. Blood Alcohol Concentrations were taken by trained operators utilizing a Stephenson Model 900 Breathalyzer. An accompanying Mark calibration unit was utilized to insure accuracy of the device.

7. Total number of interviews taken was 1600 in 1972 and 1510 in 1973. Total number of interviews with drivers under 20 years of age was 313 in 1972 and 306 in 1973.

(EXCERPT FROM PAGE 1 OF DEFENDANTS' EXHIBIT 3)

TABLE I. PARTIAL DATA SUMMARY, 1972 and 1973 Roadside Survey, Oklahoma City Oklahoma, OMEC, Inc.

RESPONDENT	Males Less Than 20 Years		All Males		Females Less Than 20 Years		All Females	
YEAR	1972	1973	1972	1973	1972	1973	1972	1973
Drink Alcoholic Beverages--Yes (Percent)	70.4	75.6	75.5	75.2	68.6	70.6	59.9	60.2
Drank Alcoholic Beverages in Last 2 hours--Yes (Percent)	16.5	15.6	21.2	21.6	11.4	11.7	14.1	10.9
BAC Greater Than .01 (Percent)	14.6	8.4	17.5	16.7	11.5	7.4	10.8	7.8
BAC Greater Than or Equal To .05 Given BAC Greater Than .01 (Percent)	28.7	50.0	51.2	52.3	14.3	0.0	35.8	40.7
Average Miles Driven	15,670	16,794	19,360	20,042	10,471	10,456	10,803	11,399
Average Days/ Week Driving Vehicle	6.8	6.7	6.7	6.7	6.7	6.5	6.5	6.4
Number of Participants	243	238	1246	1161	70	68	354	349

TABLE 2. TOTAL MALES

Total Males (Number)	1972: 1246 1973: 1161			
a. Positive BAC	1972:	BAC	Number	Percent
		00	984	78.97
		01	39	3.13
		02	44	3.53
		03	29	2.33
		04	33	2.65
		05	16	1.28
		06	18	1.44
		07	16	1.28
		08	20	1.61
		09	11	.88
		10	2	.16
		11	6	.48
		12	5	.40
		13	4	.32
		14	3	.24
		15	4	.32
		16	3	.24
		17	1	.08
		18	1	.08
		19	1	.08
		Refused	6	.48
	1973:	00	950	81.83
		01	14	1.21
		02	30	2.58
		03	32	2.76
		04	25	2.15
		05	19	1.64
		06	17	1.46
		07	14	1.21
		08	12	1.03
		09	9	.78
		10	7	.60
		11	5	.43
		12	3	.26
		13	5	.43
		14	2	.17
		15	6	.52
		18	2	.17
		21	1	.09
		24	1	.09
		25	1	.09
		Refused	6	.52

TABLE 2. (Continued)

b. Do you drink? Yes.	1972:		941	75.52%
	1973:		873	75.19%
c. Drink preference.	1972:	Beer:	713	75.77%
		Wine:	69	7.33%
		Liquor:	159	16.90%
	1973:	Beer:	643	73.65%
		Wine:	80	9.16%
		Liquor:	150	17.18%
d. Drank In Last 2 Hours? Yes.	1972:		264	21.19%
	1973:		251	21.62%

TABLE 3. MALES UNDER 20

Males Under 20 (Number)	1972: 243 1973: 238			
a. Positive BAC	1972:	BAC	Number	Percent
		00	207	81.82
		01	9	3.56
		02	10	3.95
		03	8	3.16
		04	8	3.16
		05	2	.79
		06	4	1.58
		08	2	.79
		09	2	.79
		11	1	.40
	1973:	00	217	91.18
		01	1	.42
		02	4	1.68
		03	3	1.26
		04	3	1.26
		05	2	.84
		06	4	1.68
		07	1	.42
		09	2	.84
		10	1	.42
b. Do you drink? Yes.	1972:		171	70.37%
	1973:		180	75.63%
c. Drink preference.	1972:	Beer:	143	83.63%
		Wine:	13	7.60%
		Liquor:	15	8.77%
	1973:	Beer:	144	80.00%
		Wine:	21	11.67%
		Liquor:	15	8.33%
d. Drank In Last 2 Hours? Yes.	1972:		40	16.46%
	1973:		37	15.55%

iii-c

TABLE 4. TOTAL FEMALES

Total Females (Number)	1972: 354 1973: 349				
a. Positive BAC	1972:		BAC	Number	Percent
			00	306	86.44
			01	8	2.26
			02	16	4.52
			03	3	.85
			04	5	1.41
			05	4	1.13
			06	3	.85
			07	1	.28
			08	1	.28
			09	1	.28
			10	1	.28
			12	2	.56
			14	1	.28
			Refused	2	.56
	1973:		00	317	90.83
			01	2	.57
			02	6	1.72
			03	7	2.01
			04	3	.86
			05	4	1.15
			07	3	.86
			08	2	.57
			09	1	.29
			10	1	.29
			20	1	.29
			Aborted	1	.29
			Refused	1	.29
b. Do you drink? Yes.	1972:			212	59.89%
	1973:			210	60.17%
c. Drink preference.	1972:	Beer:		114	53.77%
		Wine:		30	14.15%
		Liquor:		68	32.08%
	1973:	Beer:		93	44.29%
		Wine:		36	17.14%
		Liquor:		81	38.57%
d. Drank in Last 2 Hours? Yes.	1972:			50	14.12%
	1973:			38	10.89%

TABLE 5. FEMALES UNDER 20

Females Under 20 (Number)	1972: 70 1973: 68				
a. Positive BAC	1972:		BAC	Number	Percent
			00	61	87.14
			01	2	2.86
			02	3	4.29
			03	2	2.86
			04	1	1.43
			06	1	1.43
	1973:		00	63	92.65
			02	2	2.94
			03	3	4.41
b. Do you drink? Yes.	1972:			48	68.57%
	1973:			48	70.59%
c. Drink preference.	1972:	Beer:		37	77.08%
		Wine:		4	8.33%
		Liquor:		7	14.58%
	1973:	Beer:		24	50.00%
		Wine:		12	25.00%
		Liquor:		12	25.00%
d. Drank in Last 2 Hours? Yes.	1972:			8	11.43%
	1973:			8	11.76%

DEFENDANTS' EXHIBIT 4

O K L A H O M A

SUMMARY OF MOTOR VEHICLE TRAFFIC COLLISIONS

SUMMARY OF STATEWIDE COLLISIONS FOR YEAR 1972 (Month or other period)

This Summary includes reports and information available on March 19, 1973, FROM REPORTS OF COLLISIONS INVESTIGATED BY POLICE OFFICERS.

NUMBER OF PERSONS KILLED AND INJURED

AGE GROUP		TOTAL				DRIVER			
		KILLED		INJURED		KILLED		INJURED	
		MALE	Female	MALE	Female	MALE	FEM.	MALE	FEM.
17-21	Municipal	34	8	1640	1277	16	4	932	637
	Other	82	26	1171	629	49	10	681	261
	Statewide	116	34	2811	1916	65	14	1613	898

(EXCERPT FROM PAGE 7 OF DEFENDANTS' EXHIBIT 4)

DEFENDANTS' EXHIBIT 5

O K L A H O M A

SUMMARY OF MOTOR VEHICLE TRAFFIC COLLISIONS

SUMMARY OF STATEWIDE COLLISIONS FOR YEAR 1973 (Month or other period)

This Summary includes reports and information available on April 15, 1974 FROM REPORTS OF COLLISIONS INVESTIGATED BY POLICE OFFICERS.

NUMBER OF PERSONS KILLED AND INJURED

AGE GROUP		TOTAL				DRIVER			
		KILLED		INJURED		KILLED		INJURED	
		MALE	Female	MALE	Female	MALE	FEM.	MALE	FEM.
17-21	Municipal	34	13	1796	1373	16	6	995	695
	Other	91	27	1277	676	53	9	745	292
	Statewide	125	40	3073	2049	69	15	1740	987

(EXCERPT FROM PAGE 7 OF DEFENDANTS' EXHIBIT 5)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FILED FOR THE WESTERN DISTRICT OF OKLAHOMA

MAY 17, 1975

REX B. HAWKS
CLERK, UNITED STATES
DISTRICT COURT
By /s/ VERA EDDLEMAN
DEPUTY

NO. CIV-72-867

MARK WALKER, CURTIS CRAIG,
and CAROLYN WHITENER, d/b/a
The Honk and Holler,
Plaintiffs,

v.

HONORABLE DAVID HALL, Governor, State of Oklahoma; HONORABLE LARRY DERRYBERRY, Attorney General, State of Oklahoma; D. M. BERRY, Chairman; LAWTON L. LEININGER, Vice-Chairman; J. L. MERRILL, Secretary-Member, Oklahoma Tax Commission, State of Oklahoma; ROBERT L. HERT, Presiding District Judge, Ninth Judicial District, State of Oklahoma; CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma; ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma; FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma; and HOWARD W. HOYT, Chief of Police, City of Stillwater, Oklahoma,
Defendants.

Fred P. Gilbert, Attorney, Tulsa, Oklahoma, for Plaintiffs

Steven E. Moore, James R. Barnett and James H. Gray, Assistant Attorneys General, State of Oklahoma (Honorable Larry Derryberry, Attorney General, State of Oklahoma, on the brief) for Defendants

Before HOLLOWAY, Circuit Judge; DAUGHERTY, Chief Judge, Western District of Oklahoma, and Eubanks, District Judge, Western District of Oklahoma.

J U D G M E N T

On consideration of the evidence, the briefs and arguments of counsel, and in accordance with the court's Memorandum Opinion, which constitutes our findings and conclusions herein,

It is ORDERED that judgment be and is entered adjudging that the Oklahoma statutes in question, 37 O.S.A. §§ 241 and 245 are valid; that all relief sought by the complaint is denied; and that the action is dismissed.

/s/ William J. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

/s/ Fred Daugherty
Fred Daugherty, Chief Judge
Western District of Oklahoma

/s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

Judgment entered in Civil Docket on 5-17-75 — Adelaide Holston, Deputy.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

JUL 14, 1975

REX B. HAWKS
CLERK, UNITED STATES
DISTRICT COURT
BY ZETA M. COWAN
DEPUTY

NO. 72-867-Civil

MARK WALKER, CURTIS CRAIG, and
CAROLYN WHITENER, d/b/a
The Honk and Holler,
Plaintiffs,

v.

HONORABLE DAVID HALL, Governor, State of Oklahoma; HONORABLE LARRY DERRYBERRY, Attorney General, State of Oklahoma; D. M. BERRY, Chairman; LAWTON L. LEININGER, Vice-Chairman; J. L. MERRILL, Secretary-Member, Oklahoma Tax Commission, State of Oklahoma; ROBERT L. HERT, Presiding District Judge, Ninth Judicial District, State of Oklahoma; CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma; ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma; FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma; and HOWARD W. HOYT, Chief of Police, City of Stillwater, Oklahoma,
Defendants.

ORDER OVERRULING MOTION FOR NEW TRIAL

On consideration of the motion for new trial filed by the plaintiffs, and their memorandum in support of motion for new trial, it is hereby ORDERED that said motion for new trial is overruled.

The Court is appreciative of the thorough presentation of this case by all counsel.

Dated this 14 day of July, 1975.

/s/ William J. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

/s/ Fred Daugherty
Fred Daugherty, Chief Judge
Western District of Oklahoma

/s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

AUG 11, 1975

REX B. HAWKS
CLERK, UNITED STATES
DISTRICT COURT
BY WALTER W. MOUNTS
DEPUTY

No. CIV-72-867

MARK WALKER
and
CURTIS CRAIG
and
CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Plaintiffs,

vs.

Hon. DAVID HALL, Governor,
Hon. LARRY DERRYBERRY,
Hon. D. M. BERRY,
Hon. LAWTON L. LEININGER,
Hon. J. L. MERRILL,
Hon. ROBERT L. HERT,
Hon. CHARLES H. HEADRICK,
Hon. ROSE JARVIS,
Hon. FRANK PHILLIPS,
and
Hon. HOWARD W. HOYT,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that the Plaintiffs above-named hereby appeal to the Supreme Court of the

United States the decision and judgment of the District Court herein of May 17, 1975, motion for new trial overruled July 14, 1975.

This appeal is taken pursuant to 28 U.S.C. 1253.

August 10, 1975

/s/ Fred Gilbert
FRED P. GILBERT
1401 National Bank of Tulsa Bldg.
Tulsa, Oklahoma 74103

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Frederick P. Gilbert, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served this Notice of Appeal upon the Defendants herein by mailing a copy thereof to the counsel of record for all Defendants herein, to wit: the Hon. Larry Derryberry, Attorney General of the State of Oklahoma, to him at his office in the State Capitol Building, Oklahoma City, Oklahoma, Attn: Mr. James Gray, Assistant Attorney General, this 10th day of August, 1975, with first class postage thereon fully prepaid.

All parties required to be served have been served.

/s/ Fred Gilbert

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

FEB 14, 1973
REX B. HAWKS
CLERK, UNITED STATES
DISTRICT COURT
/s/ RUTH T. OLSEN

No. CIV-72-867

MARK WALKER and
CAROLYN WHITENER, d/b/a
the "Honk and Holler",
Plaintiffs,

vs.

HONORABLE DAVID HALL, GOVERNOR, STATE OF OKLAHOMA; HONORABLE LARRY DERRYBERRY, ATTORNEY GENERAL, STATE OF OKLAHOMA; CLARENCE L. DeWEES, CHAIRMAN, LAWTON L. LEININGER, VICE-CHAIRMAN, M. C. CONNORS, SECRETARY-MEMBER, OKLAHOMA TAX COMMISSION, STATE OF OKLAHOMA; ROBERT L. HERT, PRESIDING DISTRICT JUDGE, NINTH JUDICIAL DISTRICT, STATE OF OKLAHOMA; CHARLES H. HEADRICK, DISTRICT ATTORNEY, NINTH JUDICIAL DISTRICT, STATE OF OKLAHOMA; ROSE JARVIS, DISTRICT COURT CLERK, PAYNE COUNTY, STATE OF OKLAHOMA; FRANK PHILLIPS, SHERIFF, PAYNE COUNTY, STATE OF OKLAHOMA; and HOWARD W. HOYT, CHIEF OF POLICE, CITY OF STILLWATER, OKLAHOMA,
Defendants.

ORDER OF DISMISSAL

This cause came on for consideration by the Court upon the motion of the defendants, David Hall, Governor, State of Oklahoma, Larry Derryberry, Attorney General, State of Oklahoma, Clarence L. DeWees, Chairman, Lawton L. Leininger, Vice-Chairman, M. C. Connors, Secretary-Member, Oklahoma Tax Commission, State of Oklahoma, Robert L. Hert, Presiding District Judge, Ninth Judicial District, State of Oklahoma, Charles H. Headrick, District Attorney, Ninth Judicial District, State of Oklahoma, Rose Jarvis, District Court Clerk, Payne County, State of Oklahoma, Frank Phillips, Sheriff, Payne County, State of Oklahoma, and Howard W. Hoyt, Chief of Police, City of Stillwater, Oklahoma, to dismiss this action pursuant to Rule 12, Federal Rules of Civil Procedure; and the Court, having carefully considered the files in this cause together with Briefs of counsel, is of the opinion that this cause should be dismissed for the following reasons:

1. This Court is without jurisdiction for the reason that the Complaint does not state a claim upon which relief can be granted, and

2. The state law is a valid exercise of the State's power pursuant to the Twenty-First Amendment of the United States Constitution. *California* v. *LaRue*, _____ U. S. _____, 34 L.Ed.2d 342, 93 S.Ct. 390 (1972); *Seagram* v. *Hostetter*, 384 U.S. 35, 16 L.Ed.2d 336, 86 S.Ct. 1254 (1966); *Mahoney* v. *Triner Corp.*, 304 U.S. 401, 82 L.Ed. 1424; *Goesaert* v. *Cleary*, 335 U.S. 464, 93 L.Ed. 163; *Krauss* v. *Sacramento Inn*, 314 F.Supp. 171 (E.D.Cal. 1970).

THEREFORE, the Complaint is dismissed as to all parties.

Dated this 13th day of February, 1973.

/s/ Stephen S. Chandler
United States District Judge

APPENDIX F

FILED

OCT 23, 1973

HOWARD K. PHILLIPS
CLERK, UNITED STATES
COURT OF APPEALS
TENTH CIRCUIT

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER, 1973, TERM

No. 73-1267

MARK WALKER and CAROLYN WHITENER,
d/b/a the "Honk and Holler",
Plaintiffs-Appellants,

v.

HONORABLE DAVID HALL, GOVERNOR,
State of Oklahoma, et al,
Defendants-Appellees,
and
HONORABLE STEPHEN S. CHANDLER,
United States District Judge,
Respondent.

Fred P. Gilbert, Tulsa, Oklahoma, for Appellants.

Steven E. Moore, Assistant Attorney General (Larry Derryberry, Attorney General, on the brief), Oklahoma City, Oklahoma, for Appellees.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(District Court No. Civ. 72-867)

Before CLARK,* Associate Justice, LEWIS, Chief Judge, and HILL, Circuit Judge.

PER CURIAM.

The question before us on this appeal concerns the refusal of the trial court to comply with the request by the plaintiffs in that court for the convening of a three-judge court pursuant to 28 U.S.C. § 2281 et seq.

Appellants, plaintiffs in the trial court, by the allegations of their complaint attacked the constitutionality of an Oklahoma statute, 37 O.S. 241 to 245, inclusive. In substance this statute pertains to the sale of 3.2 beer in the state, it permits such sales to females over the age of 18 years and prohibits such sales to males until they reach the age of 21 years. The complaint alleges the statute is unconstitutional as violative of the equal rights protection clause of the Fourteenth Amendment to the Constitution of the United States and, in seeking to enjoin the enforcement of the state statute, urges unconstitutional sex discrimination. Appellees, by their motion to dismiss which was sustained by the trial court, relied heavily on the Twenty-First Amendment as authority for the state to enact the questioned statute.

---

* Associate Justice, United States Supreme Court, Retired, sitting by designation.

From these basic legal contentions, we must conclude the existence of a substantial federal constitutional question. Thus the case comes clearly within the purview of 28 U.S.C. § 2281 and a three-judge court must be convened in accordance with 28 U.S.C. § 2284.

The order granting the motion to dismiss is VACATED and the case is REMANDED for further proceedings consistent herewith. The alternative relief requested by appellants is denied with the observation that our disposition of the appeal should not be construed as any indication of our thoughts concerning the merits of the case or defenses raised thereto.

Supreme Court, U. S.
FILED
FEB 25 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-628

CURTIS CRAIG,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Appellants,

vs.

Hon. DAVID BOREN, Governor,
State of Oklahoma,
et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Jurisdictional Statement Filed October 28, 1975
Probable Jurisdiction Noted January 12, 1976

WAYNE R. SCOTT CO., 507 S. QUAKER, TULSA, OK 74120 - (918) 587-2052

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-628

CURTIS CRAIG,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Appellants,

vs.

Hon. DAVID BOREN, Governor,
State of Oklahoma,
et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Jurisdictional Statement Filed October 28, 1975
Probable Jurisdiction Noted January 12, 1976

WAYNE R. SCOTT CO., 507 S. QUAKER, TULSA, OK 74120 - (918) 587-2052

STATEMENT OF COUNSEL

This Single Appendix has been prepared through the joint efforts of counsel for both sides to this Appeal. In view of Supreme Court Rule 36(2), that the entire Record is always available for inspection, and that a supplemental appendix may be submitted as a safeguard against surprise and to further the interests of justice, this Single Appendix does not, therefore, purport to be a reproduction of the entire Record herein.

By the same token, the inclusion of some particular item or items herein means no more than that one side or the other, not necessarily both, desires to call the Court's attention thereto. Such item's or items' inclusion herein does not, therefore, constitute a stipulation that the formal Record herein actually includes such item or items, nor does such inclusion herein constitute a waiver of any objection that either side or the other might have thereto.

The Attorneys

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ITEM 1 — DOCKET ENTRIES — W.D. OKLA. CIV-72-867 (EXTRACT)

12-20-72 Filed Complaint

1-10-73 Filed dfts' Mtn to Dism for Failure to State Claim w/attached Brf — w/s

2-1-73 Filed plfs' Response to dfts' Rule 12 (B)(6) Mtn to Dism — w/s

2-14-73 Filed and entered Order of Dismissal — THAT compl. is dism'd as to all parties (findings: Ct w/o jurisd. as compl. does not state claim upon which relief can be granted & state law is valid exercise of State's power) (Chandler) (COB # 98) (Clerk) (copies mailed — ro)

3-15-73 (Posted to docket sheet 3-22-73) Plfs' Notice(s) of Appeal and/or Application for Writ of Mandamus from jdgmt entered Feb. 13, 1973, filed Feb. 14, 1973 (record due in CC of A 4-24-73)

11-16-73 Rec'd Opinion & Mandate

11-16-73 Filed copy of Opinion

11-16-73 Filed cert copy of Mandate (order granting mtn to dism is vacated & case remanded for further proceedings consistent w/Opinion; alt. relief req'd by appellants is denied w/observation that our disposition of appeal should not be construed as any indication of our thoughts re merits of case or defenses raised thereto) (Clark, Lewis, & Hill)

12-6-73 Filed Order that Court (Three Judge) be constituted as follows: Hon. Wm. J. Holloway, Jr., U.S. Circuit Judge; Hon. Frederick A.

Daugherty, U.S. Dist. Judge; and Hon. Luther B. Eubanks, U.S. Dist. Judge (dated Dec. 3, 1973) (David T. Lewis, Chief Judge, U.S. Ct. of Appeals = 10th Circuit)

12-6-73 Enter Order, case set for pretrial on Mon., Dec. 17, 1973, 3:30 p.m. (Daugherty)

12-10-73 Enter Order Plf's Motion for Thre4 Judge Panel is satisfied by such panel being convened (Daugherty) cnsl ntf ve

12-13-73 Filed Order overruling defts' Motion to Dismiss; defts to file Ans. on or before 12-14-73 (Holloway, Daugherty & Eubanks) copies to cnsl and judges — ve

12-14-73 Filed Answer of defts' w/s copies to judges — ve

12-17-73 Ent Pretrial hrg: case pretried; to be tried before 3 judge ct.; deft. to file substitution of parties; plf's mtn to add addl. plf granted; plf's request for atty fee abandoned; plf to file br w/in 5 days re burden of proof; deft to answer 10 days thereafter (Daugherty) ve

12-26-73 Filed Plf's Memo. on Burden of Estab. Constit. & tests for Constitutionality w/s/ copies to judges — ve

1-2-74 Filed dfts' Memo. on Burden of Proof & Constitutionality of State Statutes — w/s

1-11-74 Filed plfs' Reply Memo. on Burdens of Proof & Tests for Constitutionality — w/s

2-5-74 Filed First Pretrial Order (Holloway, Daugherty, & Eubanks)

5-3-74 Enter Order case set for trial before the Hon. Wm. J. Holloway, Jr., U.S. Circuit Judge,

Hon. Fred Daugherty, Chief Judge U.S. Dist. Court and Hon. Luther B. Eubanks, U.S. Dist. Judge, on Monday 20, 1974 at 9:30 a.m. in Courtroom No. 1. (Daugherty) cnsl., A.G. and Gov. David Hall ntf by cert. mail) ve

5-7-74 Filed Plf's Motion to Add Addl Party Plf w/s

5-8-74 Filed Order allowing Curtis Lee Craig to be added as addl party plf (Judges Holloway, Daugherty & Eubanks) copies to cnsl and Judges ve

5-14-74 Filed copy of ltr from Court to Counsel advising that burden of proof rests on the dfts (Daugherty) copy to Judges Holloway & Eubanks

5-16-74 Filed dfts Motion for Substitution of Parties w/s/

5-17-74 Filed Order Substituting Parties Defendant; D. M. Berry, Chairman, L. L. Leininger, Vice Chairman, and J. L. Merrill, Secretary, all officials of the Okla. Tax Comm., are substituted as parties dft (Holloway, Daugherty, & Eubanks) (COB # 103) (Clerk) (copies to parties & to Judges — ve)

5-20-74 Ent. Non Jury Trial before 3-Judge Panel: Cnsl announce ready; opening stmts by cnsl; burden rests on dfts. Dfts present case in chief w/test of wtnses and Ex. 1-8 adm. Dfts rest. Plfs move for judgm. mtn denied; Plfs' present case in chief w/test of witnesses and Ex. 2, 3 & 4 being adm. All evidence in. Defts to file brief of authorities w/in 20 days; plfs reply br 15 days thereafter; may have

further arguments, if so, cnsl will be advised (Holloway, Daugherty & Eubanks) ve

6-17-74 Filed Dfts Brief as ordered at trial of 5-20-74 (copies to Judges — afj

7-23-74 Filed Plaintiffs Brief w/s Copies to Judges by wwm

8-20-74 Enter Order case set for oral arguments on Fri., Sept. 27, 1974, at 10:00 a.m. (Daugherty) cnsl ntf ve also Judges

9-27-74 Enter Hng on Oral Arguments: Arguments presented; dfts to respond to plf's Supplemental Brief w/in 10 days; case ill be consid subm at that time (Holloway, Daugherty & Eubanks) ve

9-27-74 Filed Plaintiff's Supplement to Brief w/s (copies to judges — ve)

10-3-74 Filed letter to Clerk from Atty for Plfs re status of Bassett v. Bassett (Okla. App., 1974) 521 P.2d 434. Copies to judges — ve

10-4-74 Filed Defts' Reply to the Suppl Brief of Plfs w/s/ copies to Judges — AJF

5-17-75 Filed and entered Judgment — THAT judg is ent'd adjudging that Okla. statutes in question, 37 OSA 241 and 245 are valid; that all relief sought by complaint is denied & action is dism'd (Holloway, Daugherty, & Eubanks) (COB # 108) (Clerk) (copies to parties ve)

5-17-75 Filed Memorandum Opinion (Holloway, Daugherty, & Eubanks)

5-27-75 Filed Plfs Motion for New Trial w/Memorandum — Motion for Extention of Time to File

Brief in Support w/s/ (copies to judges wwm)

6-24-75 Filed Plfs' Memorandum in Support of Mtn for New Trial w/s/ copy to judges ve

7-14-75 Filed Order Overruling Mtn for New Trial by plfs (Holloway, Daugherty, Eubanks) zmc ws

7-15-75 Filed dfts' Response to Plfs' Mtn for New Trial — ws

8-11-75 Filed plfs' Notice of Appeal to U.S. Sup. Ct. from jdgmt entered May 17, 1975, and order overrlng mtn for new trial July 14, 1975 — w/s (record due in U.S. Sup. Ct. Oct. 10, 1975) Copies to judges — jj

1-20-76 Filed cert copy of Supreme Ct's Notice of probable jurisdiction of Appeal (Michael Rodak, Jr., Clerk) (Sup. Ct # 75-628)

ITEM 2 — COMPLAINT (ENTIRE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

FILED
DEC 20 1972
CLERK, U. S. DISTRICT COURT
Deputy

COMPLAINT

[1] **Jurisdictional Allegations**

1. This is a Federal civil-rights lawsuit brought under 42 U.S.C. 1983 for a declaratory judgment, 28 U.S.C. 2201, to adjudicate as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution so much of the statutory scheme established by the Laws of Oklahoma, to wit, 37 O.S. 241-245, whereby male members — and male members *only* — of the class of all persons in the 18 to 21 year old age category are forbidden to be sold and to purchase 3.2% beer; for injunctive relief enjoining the enforcement of the said statutory discrimination imposed only upon male members of the class of all persons 18-21 years of age; for

attorney's fees and costs of this action; and for such further equitable and legal relief as to the Court might appear just and proper.

2. The Plaintiff Mark Walker is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Payne County, Oklahoma, within the Western District of Oklahoma. The Plaintiff Walker is a member of the male sex; and was born on November 20, 1952, thereby making him presently twenty years of age, and at all times material herein a member of the class comprised of all persons 18-21 years of age. As appears more fully under the "Substantive Cause of Action" hereto, the Plaintiff Walker desires to purchase 3.2% beer for consumption in private.

3. The Plaintiff Carolyn Whitener is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Oklahoma, within the Western District of Oklahoma. The Plaintiff Whitener does business as the "Honk and Holler" at 602 West Sixth Street, Stillwater, Oklahoma, within the Western District of Oklahoma. As appears more fully under the "Substantive Cause of Action" hereto, the Plaintiff Whitener is a licensed vendor of 3.2% beer, [2] and desires to sell 3.2% beer to males as well as other persons from amongst the class of persons 18-21 years of age for consumption off her premises.

4. The Plaintiff Walker, as a desiring and prospective 18-21 year old male purchaser of 3.2% beer, has standing to assert the rights of the Plaintiff Whitener, as a desiring and prospective vendor of 3.2% beer to 18-21 year old males; and vice versa.

5. The Defendant David Hall is a natural person, a

citizen of the United States and of the State of Oklahoma, and a resident of Oklahoma City, Oklahoma, within the Western District of Oklahoma. The Defendant Hall is further the Governor of the State of Oklahoma.

6. The Defendant Larry Derryberry is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Oklahoma City, Oklahoma, within the Western District of Oklahoma. The Defendant Derryberry is further the Attorney General of the State of Oklahoma.

7. The Defendants Clarence L. DeWees, Lawton L. Leininger, and M. C. Connors are natural persons, citizens of the United States and of the State of Oklahoma, and residents of Oklahoma City, Oklahoma, within the Western District of Oklahoma. The Defendants DeWees, Leininger, and Connors are further the three members of the [three-man] Oklahoma Tax Commission, and in more particular are, respectively, the Chairman, the Vice-Chairman, and the Secretary thereof.

8. The Defendant Robert L. Hert is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Oklahoma, within the Western District of Oklahoma. The Defendant Hert [3] is further the Presiding District Judge of the Ninth Judicial District Court of the State of Oklahoma, which Ninth Judicial District encompasses Payne and Logan Counties, Oklahoma, within the Western District of Oklahoma.

9. The Defendant Charles H. Headrick is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Oklahoma, within the Western District of Oklahoma. The Defendant

Headrick is further the District Attorney for the Ninth Judicial District of the State of Oklahoma, which Ninth Judicial District encompasses Payne and Logan Counties, Oklahoma, within the Western District of Oklahoma.

10. The Defendant Rose Jarvis is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Oklahoma, within the Western District of Oklahoma. The Defendant Jarvis is further the District Court Clerk of Payne County, State of Oklahoma, within the Western District of Oklahoma.

11. The Defendant Frank Phillips is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Payne County, Oklahoma, within the Western District of Oklahoma. The Defendant Phillips is further the Sheriff of Payne County, Oklahoma, within the Western District of Oklahoma.

12. The Defendant Howard W. Hoyt is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Oklahoma, within the Western District of Oklahoma. The Defendant Hoyt is further the Chief of Police of the City of Stillwater, Oklahoma, within the Western District of Oklahoma.

[4]

13. As appears more fully under the "Substantive Cause of Action" hereto, the monetary amount in controversy herein is in excess of Ten Thousand Dollars, exclusive of interest and costs; and the territorial situs of the wrongs complained of lies within the Western District of Oklahoma.

14. Jurisdiction over the subject-matter of this lawsuit

is conferred upon the U.S. District Court for the Western District of Oklahoma by 28 U.S.C. 1331, 1343(3), and 1343(4).

15. Venue over the subject-matter of this lawsuit is conferred upon the U.S. District Court for the Western District of Oklahoma by 28 U.S.C. 1391(b).

16. Venue over the Parties to this lawsuit is conferred upon the U.S. District Court for the Western District of Oklahoma by 28 U.S.C. 1391(b), 1392(a), and 1393(b).

17. A requirement to convene a three-judge district court to grant the injunctive relief prayed for by this lawsuit is imposed upon this Court herein by 28 U.S.C. 2281 et seq:

> (a) This action seeks, in substantial part, an injunction permanently enjoining various State officers, Defendants herein, from enforcing the unconstitutional discrimination based on sex contained in 37 O.S. 241-245.
>
> (b) The claim of the [un]constitutionality of the age-sex discrimination at bar herein constitutes a "substantial [and meritorious] Federal question" within the Tenth U.S. Circuit. *Lamb* v. *Brown* (10th Cir., 3/16/72) 456 F.2d 18. See also *Reed* v. *Reed* (1971) 404 U.S. 71, 30 L.Ed.2d 225, 92 S. Ct. 251.

[5]

> (c) No State criminal, quasi-criminal, or administrative prosecutions or proceedings are presently pending or contemplated against any of the Plaintiffs to this lawsuit. See Syl. 2a to *Lake Carriers' Assn.* v. *MacMullan* (5/30/72) _____ U.S. _____, 32 L. Ed. 2d 257, 92 S. Ct. 1749.

Substantive Cause of Action

18. All Jurisdictional Allegations are hereby incorporated herein by reference.

19. The Laws of Oklahoma, in relevant part, to wit, 37 O.S. 241 and 245, provide as follows:

> "241. Sale barter or gift to minor unlawful. — It shall be unlawful for any person who holds a license to sell and dispense beer and/or any agent, servant, or employee of said license holder to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two tenths (3.2) per cent of alcohol measured by weight. Provided, a parent as regards his own child or children, is excepted from the provisions of this Act."
>
> "245. "Minor" defined. — A "minor," for the purposes of Sections 241 and 243 of Title 37 of the Oklahoma Statutes, is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years."

20. Elsewhere within Chapter 2 to Title 37 of the Statutes of Oklahoma, various coercive and intimidatory administrative and criminal sanctions (e.g., revocation or cancellation of license, fine, and imprisonment) are specified for violations of the above-quoted statutory sections.

21. The purpose, intent, and effect of 37 O.S. 245, quoted above, and when taken in conjunction with 37 O.S. 241 and the other relevant portions of Chapter 2 to Title 37 of the Statutes of Oklahoma, is to take [6] the broad class comprised of all persons 18 to 21 years of age, and then to discriminate amongst the

persons included within this broad 18-21 year old class of persons solely upon the basis of their biological sex(es), by denying to members of the unfavored (i.e., male) sex within this age group the equal right to purchase 3.2% beer for private consumption as is freely recognized and allowed to and enjoyed by other persons of the favored (i.e., female) category within the same age group.

22. The State statutory discrimination herein, insofar as it purports to deny to males within the broad 18-21 year old age group the equal right to purchase 3.2% beer for private consumption, is invidious, arbitrary, irrational and capricious, and violates the civil rights of the said males in the broad 18-21 year old age group to the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment to the Constitution, in that the said discrimination is illegally and wrongfully predicated solely upon the legislatively irrelevant, constitutionally impermissible and inherently suspect classification of said aggrieved persons' biological sex and reproductive anatomy, which biological and anatomical bases for legal classification regarding the purchase and consumption of 3.2% beer are totally lacking in all reasonable relationship to any legitimately permissible public policy or legislative end.

23. Because of the foregoing discriminatory State statutory scheme, the Plaintiff Walker, who is a member of the discriminated-against male sub-group of the main class of all persons 18-21 years of age, and is desirous and financially able to purchase 3.2% beer for consumption in private, nevertheless finds himself legally and effectively thwarted in his desire to do so. In particular, the Plaintiff Walker has on numerous occasions heretofore

contacted inter alia the Plaintiff Whitener, a licensed retail vendor or 3.2% beer doing business as the "Honk and Holler" [7] in Stillwater, Oklahoma, with a view towards making purchases of 3.2% beer from the said Plaintiff Whitener, who is personally desirous of selling such 3.2% beer to the Plaintiff Walker, but who nevertheless refuses to do so, to the Plaintiff Walker's extreme injury.

24. The reasons why the Plaintiff Whitener, although personally desirous to sell 3.2% beer to the Plaintiff Walker for consumption off the premises of the "Honk and Holler," nevertheless fails and refuses to do so (and likewise fears and declines to make any such sales to other male members of the class of all persons 18-21 years of age) are as follows:

a) The coercive and intimidatory effect against such sales engendered by the assailed discriminatory State stautory scheme outlined above, prohibiting the sale of 3.2% beer to male members of the class of all persons 18-21 years of age, and the administrative and criminal sanctions for violations thereof; and

b) The past, present, and threatened enforcement of the said discriminatory State statutory scheme assailed herein (and of the related administrative and criminal sanctions in support thereof) by the Defendants herein.

25. Regarding the past, present, and threatened enforcement of the assailed statutory discrimination by the Defendants herein, both Plaintiffs would in more particular allege as follows:

a) The Defendant David Hall, as Governor and chief

executive of the State of Oklahoma, executes all Oklahoma laws, including those herein assailed, throughout the State of Oklahoma.

[8]

b) The Defendant Larry Derryberry, as Attorney General and chief law enforcement officer of the State of Oklahoma, enforces all Oklahoma laws, including those assailed herein, throughout the State of Oklahoma.

c) The Defendant Frank Phillips, as Sheriff of Payne County, Oklahoma, enforces all Oklahoma laws, including those assailed herein, throughout Payne County, Oklahoma.

d) The Defendant Howard Hoyt, as Chief of Police of the City of Stillwater, Oklahoma, enforces all Oklahoma laws, including those assailed herein, throughout the said City of Stillwater, Oklahoma.

e) The Defendant Charles Headrick, as District Attorney for the State of Oklahoma within Payne County, Oklahoma, enforces all Oklahoma laws, including those assailed herein, throughout the said Payne County, Oklahoma; and further, the said Defendant Headrick, as District Attorney within Payne County, Oklahoma, also has specific duties under Oklahoma law, as contained more fully in Chapter 2 to Title 37 of the Statutes of Oklahoma, to enforce and administer the discriminatory State statutory scheme assailed herein.

f) The Defendants Clarence DeWees, Lawton Leininger, and M. C. Connors, as the members of the Oklahoma Tax Commission, have specific duties under Oklahoma law, as contained more fully in Chapter 2 to Title 37 of the Statutes of Oklahoma,

to enforce and administer the discriminatory State statutory scheme assailed herein.

[9]

g) The Defendant Robert Hert, as Presiding District Judge within Payne County, Oklahoma, has specific quasi-executive or administrative duties under Oklahoma law, as contained more fully in Chapter 2 to Title 37 of the Statutes of Oklahoma, to enforce and administer the discriminatory State statutory scheme assailed herein.

h) The Defendant Rose Jarvis, as District Court Clerk within Payne County Oklahoma, has specific quasi-executive or administrative duties under Oklahoma law, as contained more fully in Chapter 2 to Title 37 of the Statutes of Oklahoma, to enforce and administer the discriminatory State statutory scheme assailed herein.

26. The injury accruing to the Plaintiff Walker herein solely because of the legally irrelevant and constitutionally impermissible criteria of his biological sex and his reproductive anatomy is both physical and mental, to wit: the cruel denial of the physical benefits derivable from 3.2% beer; and the even crueler mental and emotional humiliation engendered by the degrading and inferior status publicly accorded him simply on the basis of irrelevant biological factors, not unlike those of race, over which he had and has no control. The monetary damage caused by the physical and mental injury herein, through difficult of precise estimation, exceeds Ten Thousand Dollars, exclusive of interest and costs; and because of the imprecise extent and recurring nature of the physical and mental injury herein, remedies at law are inadequate to protect the Plaintiff Walker

in his Federally-guaranteed Equal Protection civil right to purchase 3.2% beer for private consumption free from discrimination based on sex, or upon any other illegal criterion.

[10]

27. The injury accruing to the Plaintiff Whitener from the sexually-discriminatory statute at bar, in addition to the injury to the Plaintiff Walker outlined above and suffered derivatively by the Plaintiff Whitener, consists in the diminishment of her sales to persons in the 18-21 year old category occasioned by the unconstitutional exclusion from said category of the male members thereof as legally permissible vendees and customers — which illegal exclusion of males as permissible vendees and customers within the class of all persons 18-21 years of age has already damaged the Plaintiff Whitener over Ten Thousand Dollars, exclusive of interest and costs, in lost sales of 3.2% beer, and which sexually discriminatory exclusion of males as permissible vendees and customers from the class comprised of all persons 18-21 years of age will, unless enjoined, result in future damages and losses by the diminishment of sales of 3.2% beer, in excess of Ten Thousand Dollars, exclusive of interest and costs.

28. Remedies at law are inadequate to protect the Plaintiff Whitener against the threatened future-occuring violations of her individual and derivative Federally-guaranteed Equal Protection civil rights to sell 3.2% beer to all members of a specified age group irrespective of the unconstitutional criterion of sex; this for the reason that resort to legal remedies as each such threatened, future, and unless enjoined inevitable violation should occur would involve piecemeal, periodic, and repetitive applications to court — thereby resulting in the very

multiplicity of litigation classically enjoinable by a court of equity.

WHEREFORE, premises considered, Plaintiffs pray for:

A. A judicial declaration and determination that 37 O.S. 241 and 245, and all statutory sanctions deriving therefrom, be held and adjudicated [11] unconstitutional and void insofar as they purport to prohibit the purchase, possession, and private consumption of 3.2% beer by or the sale thereof to male persons included within the class of all persons 18 to 21 years of age;

B. An injunction enjoining the Defendants, and each of them, jointly and severally, and their subordinates and successors in office, from enforcing and/or attempting to enforce those portions of 37 O.S. 241 and 245, and the ancillary statutory sanctions thereto, which purport to prohibit the purchase, possession, and private consumption of 3.2% beer by or the sale thereof to male persons included within the class of all persons 18 to 21 years of age;

C. All costs of this action, to include a reasonable attorney's fee; and

D. Such further legal and equitable relief as to the Court may seem just and proper.

/s/ Fred Gilbert

FRED P. GILBERT
1401 National Bank of Tulsa Bldg.
Tulsa, Oklahoma
(918) 582-8201

Attorney for Plaintiffs

ITEM 3 — DEFENDANTS' MOTION TO DISMISS (EXTRACT)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

The defendants move the Court as follows:

To dismiss the action because the Complaint fails to state a claim against defendants upon which relief can be granted. Argument and authorities supporting defendants' motion are contained in the brief attached hereto and made a part hereof.

Respectfully submitted,

LARRY DERRYBERRY
ATTORNEY GENERAL OF
OKLAHOMA

/s/ Steven E. Moore
STEVEN E. MOORE
ASSISTANT ATTORNEY
GENERAL

112 State Capitol Building
Oklahoma City, Oklahoma 73105
ATTORNEYS FOR
DEFENDANTS

• • •

[7]

PROPOSITION II

THERE IS A RATIONAL BASIS FOR THE CLASSIFICATION IN THE CHALLENGED STATE LAW, HENCE ITS VALIDITY MUST BE UPHELD.

Although not conceded by the defendants, should the Court conclude that it should determine the reasonableness of the classification in the challenged state law, then the defendants submit that there are reasonable, rational bases for the classification made by the Oklahoma Legislature:

(1) That there is a difference in the ages of maturity between males and females, with males maturing at an older age.

(2) That the possibility of males 18-21 years old consuming 3.2% beer to excess, becoming intoxicated, and causing injury to the general public, is greater than females 18-21 years old.

It has been long settled that the burden is on the plaintiff to prove *no* rational, reasonable basis for the challenged legis- [8] lation. If there is *any* reasonable, rational basis for the Legislative classification, then it must be upheld by the courts. *Miskunas* v. *Union Carbide*, 399 F.2d 847 (7th Cir. 1968); *Eslinger* v. *Thomas*, 340 F.Supp. 886 (S. Carolina, 1972) (denial of employment based on sex upheld), and *Williams* v. *McNair*, 316 F.Supp. 134 (S. Carolina, 1970).

The defendants submit that even if the Court con-

cludes that it should determine if there is a reasonable, rational basis for the legislative classification, that several such bases are present. The Court cannot, as a matter of law, decide the non-existence of any such reasonable basis for the classification, hence the complaint must be dismissed.

[signature block and certificate of service omitted]

ITEM 4 — ORDER OF DISMISSAL (REFERENCE)

[The single District Judge's Order of Dismissal, entered on February 13, 1973, and filed February 14, 1973, is unreported, but is reproduced at Appendix E to the Jurisdictional Statement herein.]

ITEM 5 — BRIEF OF APPELLEES, 10th CIR., NO. 73-1267 (EXTRACT)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Appellants,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Appellees.

No. 73-1267

BRIEF OF APPELLEES

[15] The appellees urge that Oklahoma's regulation is not irrational, and that the Legislature could have reasonably concluded that the prohibition of sale of 3.2 beer to males aged eighteen to twenty-one years old would be reasonably related to the ultimate safety and welfare of all of its citizens.

[20] It is obvious that the lower court felt that the complainants below has not sustained the burden in their allegations of showing that the challenged classification was without justification, or in the alternative, that the Oklahoma classification complained of, was not without [21] a rational basis.

[23] It is obvious that the lower court, by its action in

dismissing the claim of the appellants, was able to perceive some reasonable, rational justification for the legislative classification challenged. ° ° ° The appellees urge [24] that the Oklahoma Legislature could have reasonably concluded that the prohibition of the sale of 3.2 beer to males ages eighteen to twenty-one was related to the health, safety, and welfare of all the citizens of Oklahoma.

ITEM 6 — COURT OF APPEALS, REVERSAL (REFERENCE)

[The decision of the United States Court of Appeals for the Tenth Circuit herein, *Walker, et al.* v. *Hall, et al.*, No. 73-1267, October 23, 1973, vacating the single District Judge's dismissal and remanding for a three-judge panel, is unreported, but is reproduced at Appendix F to the Jurisdictional Statement herein.]

ITEM 7 — ORDER OF DECEMBER 13, 1973 (ENTIRE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

FILED

DEC 13 1973

Vera Eddleman

ORDER

This is an action challenging the constitutionality of the Oklahoma Statutes relating to the sale of 3.2 beer for consumption off the premises. The provisions of 37 Oklahoma Statutes 1973 Supp. §245 which classifies a minor for the purposes of such sales as being a female under the age of 18 and a male under the age of 21 is alleged to violate the equal rights protection clause of the Fourteenth Amendment to the United States Constitution by discriminating against males of the ages 18 to 21 by reason of sex. The action has been brought against multiple state officials seeking to enjoin the enforcement of the law prohibiting the sale of 3.2 beer to minors as same pertains to males from 18 to 21 years of age.

A Three-Judge Panel has been convened in this case pursuant to 28 U.S.C. §§2281 et seq.

Defendants have filed a Motion to Dismiss for Failure to State a Claim. The Motion is supported by a brief and Plaintiffs have filed a Response opposing same.

[2]

In support of their Motion, Defendants urge that the law being challenged relates to the regulation of intoxicating liquors and is permissible under the Twenty-first Amendment to the United States Constitution.

In *California* v. *LaRue*, 409 U.S. 109, 34 L.Ed. 2d 342, 93 S.Ct. 390 (1972) it is stated at L.Ed. 2d p. 350:

> "These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations."

This would indicate that the Twenty-first Amendment may not bar granting the relief requested in the Complaint.

A motion to dismiss should not be granted unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957).

Defendants' Motion to Dismiss is overruled. Defendants will file their Answer on or before December 14, 1973.

It is so ordered this 13th day of December, 1973.

/s/ William J. Holloway, Jr.
UNITED STATES CIRCUIT JUDGE

/s/ Fred Daugherty
UNITED STATES DISTRICT JUDGE

/s/ Luther B. Eubanks
UNITED STATES DISTRICT JUDGE

ITEM 8 — ANSWER
(ENTIRE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

FILED

DEC 14 1973

REX B. HAWKS
CLERK, U. S. DISTRICT COURT
By ..... Deputy

ANSWER

Come now the defendants, David Hall, Governor, State of Oklahoma; Larry Derryberry, Attorney General; Clarence L. DeWees, Chairman, Oklahoma Tax Commission; Lawton L. Leininger, Vice-Chairman, Oklahoma Tax Commission; M. C. Connors, Secretary, Oklahoma Tax Commission; Robert L. Hert, Presiding District Judge, Ninth Judicial District Court; Charles L. Headrick, District Attorney, Ninth Judicial District; Rose Jarvis, District Court Clerk, Payne County; Frank Phillips, Sheriff of Payne County; and Howard W. Hoyt, Chief of Police of the City of Stillwater; and for their answer to the complaint of the plaintiffs do hereby allege and state:

[2]

FIRST RESPONSE

The defendants admit the allegations of the first paragraph of the complaint.

SECOND RESPONSE

The defendants do not have any knowledge of the facts alleged in the second paragraph of the complaint and therefore cannot admit or deny same.

THIRD RESPONSE

The defendants do not have any knowledge of the facts alleged in the third paragraph of the complaint and therefore cannot admit or deny same.

FOURTH RESPONSE

The defendants deny the allegations of the fourth paragraph of the complaint.

FIFTH RESPONSE

The defendants admit the allegations of the fifth paragraph of the complaint.

SIXTH RESPONSE

The defendants admit the allegations of the sixth paragraph of Plaintiffs' complaint.

SEVENTH RESPONSE

The defendants admit that M. C. Connors and Lawton L. Leininger are members of the Oklahoma Tax Commission, holding the positions of Chairman and Vice-Chairman, respectively, and deny that Clarence L. DeWees is presently a member of said Commission.

EIGHTH RESPONSE

The defendants admit the allegations of the eighth paragraph of the complaint.

NINTH RESPONSE

The defendants admit the allegations of the ninth paragraph of the complaint.

TENTH RESPONSE

The defendants admit the allegations of the tenth paragraph of the complaint.

[3]

ELEVENTH RESPONSE

The defendants admit the allegations of the eleventh paragraph of the complaint.

TWELFTH RESPONSE

The defendants admit the allegations of the twelfth paragraph of the complaint.

THIRTEENTH RESPONSE

The defendants deny that any monetary amount in controversy is in excess of $10,000.00, but admit that the situs of the allegations of the complaint are within the Western District of Oklahoma.

FOURTEENTH RESPONSE

The defendants admit the allegations of the fourteenth paragraph of the complaint.

FIFTEENTH RESPONSE

The defendants admit the allegations of the fifteenth paragraph of the complaint.

SIXTEENTH RESPONSE

The defendants admit the allegations of the sixteenth paragraph of the complaint.

SEVENTEENTH RESPONSE

The defendants admit the allegations of the seventeenth paragraph of the complaint.

EIGHTEENTH RESPONSE

The defendants admit the allegations of the eighteenth paragraph of the complaint.

NINETEENTH RESPONSE

The defendants admit the allegations of the nineteenth paragraph of the complaint.

TWENTIETH RESPONSE

The defendants admit only that other sections in Title 37, Ch. 2 of the Oklahoma Statutes provide administrative and criminal sanctions for violations of the statutes therein and deny other allegations in the twentieth paragraph of the complaint.

TWENTY-FIRST RESPONSE

The defendants deny the allegations of the twenty-first paragraph of the complaint.

[4] TWENTY-SECOND RESPONSE

The defendants deny the allegations of the twenty-second paragraph of the complaint.

TWENTY-THIRD RESPONSE

The defendants deny the allegations of the twenty-third paragraph of the complaint.

TWENTY-FOURTH RESPONSE

The defendants admit the allegations of the twenty-fourth paragraph of the complaint.

TWENTY-FIFTH RESPONSE

The defendants admit the allegations of the twenty-fifth paragraph of the complaint, but deny that the statutory scheme involved is discriminatory, and that Clarence DeWees is a member of the Oklahoma Tax Commission.

TWENTY-SIXTH RESPONSE

The defendants deny the allegations in the twenty-sixth paragraph of the complaint.

TWENTY-SEVENTH RESPONSE

The defendants deny the allegations in the twenty-seventh paragraph of the complaint.

TWENTY-EIGHTH RESPONSE

The defendants deny the allegations of the twenty-eighth paragraph of the complaint. The defendants

specifically deny that plaintiffs are entitled to any costs of this action, including a reasonable attorney's fee.

FIRST DEFENSE

The State laws complained of in this case are not unconstitutional.

SECOND DEFENSE

The State laws now challenged regulate the sale and possession of intoxicants within the territorial limits of the State of Oklahoma. As such, the State's regulation comes within the scope of authorized State activity pursuant to the Twenty-first Amendment to the Constitution of the United States of America. Under that Amendment the states have an extraordinary power over the regulation [5] of intoxicants due to their natural tendency to get out of bounds, and to cause harm, both directly and indirectly to the general citizenry of the State. Oklahoma's law herein adopted pursuant to the Twenty-first Amendment to the United States Constitution, is presumed valid.

THIRD DEFENSE

There is no constitutional right to consume intoxicating beverages, and the sale of same is validly subject to strict regulation by the Oklahoma Legislature. No significant constitutional freedoms are jeopardized by the Oklahoma laws complained of.

FOURTH DEFENSE

When a State regulates intoxicants pursuant to power granted to it by the Twenty-first Amendment, such regulations are subject only to minimal requirements of due process or equal protection.

FIFTH DEFENSE

Due to the inherent dangers posed to the general health, safety and welfare of the citizenry of Oklahoma,

involved in the sale and use of intoxicants, the strict regulation of intoxicants, in the interest of protecting the safety of the citizens, is a compelling state interest.

SIXTH DEFENSE

The Oklahoma Legislature could have reasonably concluded that males aged 18 through 21 years consume 3.2% beer in a greater quantity than females in the same age group with the result that that class of males has a greater potential for causing harm while intoxicated to the general citizenry of the State.

WHEREFORE, the defendants urge that the complaint of the plaintiffs be denied, and that the constitutionality of the State laws complained of herein be upheld, and that the defendants be [6] allowed to continue to enforce said duly adopted laws of the Oklahoma Legislature.

Respectfully submitted,

LARRY DERRYBERRY
ATTORNEY GENERAL OF OKLAHOMA

STEVEN E. MOORE
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR DEFENDANTS

[certificate of service omitted]

ITEM 9 — PRE-TRIAL ORDER (ENTIRE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

FILED

FEB 5 1974

REX B. HAWKS
CLERK, U. S. DISTRICT COURT
By [signature]
Deputy

FIRST PRE-TRIAL ORDER

Pursuant to a pre-trial conference held herein on December 17, 1973, under Federal Rule of Civil Procedure No. 16, the following matters were resolved or decided herein:

1. *Burden of Proof.* The parties did not agree as to whether the burden of proving unconstitutionality of the assailed statute lies with the plaintiffs, or whether the burden lies with the defendants to establish constitutionality. The plaintiffs and defendants have submitted their briefs on this issue for the Court's consideration.

2. *Test of Constitutionality.* The parties have both taken the position that the issue that the test of constitutionality to be applied in this case is so intertwined

with questions of law on the merits, that it is incapable of being stipulated to.

The plaintiffs contend that the State's assailed classification can be upheld only if it is necessary to the accomplishment of a compelling state objective, and that no less onerous alternatives exist to solve the problem. The defendants contend that the State's assailed classification must be upheld if it is found to be reasonably and rationally directed toward the regulation of a matter which is a compelling state interest.

3. *Parties.* Counsel for the plaintiffs advised that the plaintiff Mark Walker has passed his 21st birthday, and that [2] the plaintiffs, while not conceding mootness or loss of standing, wish to add as an additional party plaintiff one Curtis Craig, age 18.

Counsel for the defendants advised that Mr. Clarence L. DeWees has been replaced on the Oklahoma Tax Commission by a Mr. J. L. Merrill; that the positions on the Oklahoma Tax Commission have rotated; and that these changes should be duly reflected.

There being no objections, the parties will by proper motion add, substitute, and/or amend their parties.

4. *Stipulations of Fact.* Counsel for the defendants stated the defendants would stipulate to the allegations of personal data regarding the plaintiffs (and the newly-added plaintiff). The plaintiffs will therefore not be required to appear at trial to establish the historical and personal facts alleged in paragraphs 2, 3 and 23 of the Complaint (or of similar allegations concerning the newly-added plaintiff).

Regarding evidence relating to the permissibility vel non of the sexual differentiation herein, the plaintiffs intimated they would have nothing to adduce should the

Court determine that the burden of proving constitutionality is upon the defendants; but indicated that they might wish to adduce appropriate expert physiological and/or psychological testimony if the Court were to rule that the burden of proving unconstitutionality lies with the plaintiffs.

Counsel for the defendants stated that the rationale for the sexual differentiation at bar appears to be that youthful males present a graver driving-while-intoxicated problem than do youthful females, and that counsel intends to offer certain traffic statistics to establish this asserted behavioural difference.

Regarding these statistics, and pending submission of copies thereof to plaintiffs' counsel, counsel for the plaintiffs will make appropriate stipulations in effect waiving proper authentication and the hearsay objections to the government [3] publications offered by defendants, but not waiving other objection as to their relevancy.

The parties agree to exchange a list of the names and addresses of the witnesses to be called by each prior to the tenth day before trial. Summaries of the witnesses' testimony shall also be exchanged on or before the same date.

At the present time, therefore, the question of evidence and testimony on the sexual differentiation at bar is still unresolved; and the parties will promptly adivse the Court as to progress in this regard.

5. *Attorney's Fees and Costs.* Counsel for the plaintiffs has abandoned his prayer for attorney's fees, but not for costs.

The foregoing will constitute the first pre-trial order of the Court herein.

/s/ William J. Holloway, Jr.
UNITED STATES CIRCUIT JUDGE

/s/ Fred Daugherty
UNITED STATES DISTRICT JUDGE

/s/ Luther B. Eubanks
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ Fred Gilbert
FRED P. GILBERT
Attorney for Plaintiffs

LARRY DERRYBERRY
ATTORNEY GENERAL OF OKLAHOMA

By /s/ Steven Moore
STEVEN E. MOORE
ASSISTANT ATTORNEY GENERAL
Attorneys for Defendants

ITEM 10 — MOTION TO ADD ADDITIONAL PARTY PLAINTIFF (ENTIRE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

FILED
MAY 7 1974
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
DEPUTY

MOTION TO ADD ADDITIONAL PARTY PLAINTIFF

Come now Plaintiffs, and pursuant to the Pre-Trial conference and Order herein, respectfully move to add as an additional Party Plaintiff CURTIS LEE CRAIG, a member of the male sex whose date of birth is September 25, 1955 (and who is therefor presently 18 years of age).

Plaintiffs would further allege that the said Curtis Lee Craig is a citizen of the United States and of the State of Oklahoma, and a resident of Cleveland County, State of Oklahoma, within the Western District of Oklahoma, and a full-time student at the Oklahoma State University, at Stillwater, Payne County, Oklahoma, also within the Western District of Oklahoma, where the said Curtis Craig, who is desirous of purchasing 3.2% beer for

off-premises consumption on a parity with like-aged females, has on numerous occasions attempted to purchase such beer from inter alia the Plaintiff Carolyn Whitener, only to be thwarted by the Plaintiff Whitener's unwilling but statutorily coerced compliance with the sexually discriminatory scheme of the assailed 37 O.S. 241-245; and wherefor Curtis Craig adopts and incorporates for himself all corresponding allegations of the Plaintiff Mark Walker in the Complaint herein.

[2]

Plaintiffs would further allege that the prompting for the instant Motion is that the Plaintiff Mark Walker has since the commencement of this litigation passed his 21st birthday; but the Plaintiffs do not by their instant Motion concede that the instant case is moot as to the Plaintiff Walker, see *Roe* v. *Wade* (1973) 410 U.S. 113, Part IV (A), at 124-125, 93 S.Ct. at 712-713, 35 L.Ed.2d at 161, or that the Plaintiff Whitener's standing (as a prospective vendor) is in any way diminished to assert the rights of 18-21 year old males (as prospective vendees), see *Eisenstadt* v. *Baird* (1972) 405 U.S. 438, Part I, at 443-446, and *Doe* v. *Bolton* (1973) 410 U.S. 179, Part III, at 188-189, 93 S.Ct. at 745-746, 35 L.Ed.2d at 210-211.

Wherefore, premises considered, Plaintiffs pray that Curtis Craig be added to the Cause herein as an additional Party Plaintiff.

Respectfully submitted,

/S/ Fred Gilbert
FRED P. GILBERT
1401 National Bank of Tulsa Bldg.
Tulsa, Oklahoma 74103
(918) 582-8201

Attorney for Plaintiffs.

[certificate of service omitted]

ITEM 11 — ORDER ALLOWING ADDING OF ADDITIONAL PARTY PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

FILED

MAY 8 1974

REX B. HANKS
CLERK, U. S. DISTRICT COURT
By [illegible]
Deputy

ORDER ALLOWING ADDING OF ADDITIONAL PARTY PLAINTIFF

NOW, on this 8 day of May, 1974, for good cause shown, and as per the pre-trial conference and Order herein (paragraph 3), Curtis Lee Craig shall be allowed to be added to the Cause herein as an additional party Plaintiff.

IT IS SO ORDERED.

/s/ William J. Holloway, Jr.
UNITED STATES CIRCUIT JUDGE

/s/ Fred Daugherty
UNITED STATES DISTRICT JUDGE

/s/ Luther B. Eubanks
UNITED STATES DISTRICT JUDGE

ITEM 12 — LETTER-ORDER OF MAY 13, 1974

UNITED STATES DISTRICT COURT

NORTHERN, EASTERN AND WESTERN DISTRICTS OF OKLAHOMA

CHAMBERS OF
FRED DAUGHERTY
JUDGE

OKLAHOMA CITY 73101

May 13, 1974

Mr. Fred Gilbert
Attorney at Law
National Bank of Tulsa Building
Tulsa, Oklahoma

Mr. Steven E. Moore
Assistant Attorney General
State Capitol Building
Oklahoma City, Oklahoma 73102

Re: No. 72-867, W. D. Okla.
Walker, et al. v. Honorable David Hall, et al.

Gentlemen:

The Court has decided from a consideration of pertinent cases that the burden of proof in the above case rests on the defendants. The parties will proceed accordingly with reference to the May 20 trial.

Very truly yours,

/s/ Fred Daugherty
Fred Daugherty
U. S. District Judge

cc: Honorable William J. Holloway, Jr.
Federal Building
Oklahoma City, Oklahoma

Honorable Luther Eubanks
Federal Building
Oklahoma City, Oklahoma

Clerk, W. D. Oklahoma

ITEM 13 — TRANSCRIPT OF TRIAL (ENTIRE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 72-867 Civil

MARK WALKER, ET AL.,
Plaintiffs,

vs.

HONORABLE DAVID HALL, ET AL.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FRED P. GILBERT, Attorney at Law, 1401 National Bank of Tulsa Building, Tulsa, Oklahoma, 74103, appearing on behalf of the Plaintiffs.

STEVEN E. MOORE and JAMES R. BARNETT, Assistant Attorneys General, 112 State Capitol, Oklahoma City, Oklahoma, appearing on behalf of the Defendants.

The following proceedings came on for hearing on the 20th day of May, 1974, before the Honorable William J. Holloway, Jr., U. S. Circuit Judge, Fred Daugherty, U. S. District Judge, and Luther B. Eubanks, U. S. District Judge, at Oklahoma City, Oklahoma, as follows:

[3] JUDGE HOLLOWAY: Good morning. Are there Motions for Admission to the Bar?

MR. GILBERT: Your Honor, I don't believe I have ever been formally admitted over here.

JUDGE HOLLOWAY: Well, we will have to ask someone to move you. One of your adversaries here.

MR. MOORE: I will make such a motion.

May it please the Court, my name is Steven Moore. I am a member of the Western District Bar.

JUDGE HOLLOWAY: Very well. Have you applied with the Clerk yet for the papers and submitted them?

MR. GILBERT: No, Your Honor, I have not.

JUDGE HOLLOWAY: Well, we should make that motion.

MR. MOORE: We make that motion, Your Honor, for the purposes of this trial, should we not, under that rule, for your Court?

JUDGE DAUGHERTY: Are you admitted in any Federal Court?

MR. GILBERT: Yes, Your Honor, the Northern District.

JUDGE DAUGHERTY: Under our rules, he can be permanently admitted here is he is a member of another Federal Court. Do you wish permanent admission?

MR. GILBERT: Yes, sir.

[4] JUDGE DAUGHERTY: He is eligible if he is admitted in another Bar.

JUDGE HOLLOWAY: Very well. Motion should be granted. We are happy to have you.

Would you take your oath with the Clerk.

Do you have an oath you give here?

THE CLERK: Yes, I do.

JUDGE HOLLOWAY: Members of the Bar will please rise.

(Thereupon, the oath was duly administered.)

JUDGE HOLLOWAY: Happy to have you.

We have for trial this morning, the case of Mark Walker and others versus the Honorable David Hall and others.

Are the parties ready in this case?

MR. GILBERT: The Plaintiffs are ready, Your Honor.

MR. MOORE: The Defendants are ready, Your Honor.

JUDGE HOLLOWAY: Very well. We have previously advised you that the Court is of the opinion that the burden rests on the Defendants in this matter, which I think the parties are aware of, and for that reason we will proceed in the manner of letting the Defendants put their matters first and carry the burden; evidence and argument- [5] wise both.

At this time, if you wish, we will hear your brief opening statements.

I will advise you, we have all studied your briefs and are aware of your positions.

We will have opening statements at this time.

MR. MOORE: Thank you very much, Your Honor.

May it please the Court. The evidence which the State will present this morning is entirely in the form of statistics from established publications by local reporting systems.

We will have statistics from the Oklahoma State Bureau of Investigation; the Oklahoma Department of Public Safety, as well as other private studies and studies by U. S. Federal Governmental agencies. All statistics which we believe will show that males within the age group of 18 through 21 drive more, drink more and commit more alcohol related offenses.

This will consist of the proof which we offer to you this morning.

That is all I have at this time.

JUDGE HOLLOWAY: Very well. For the Plaintiffs?

MR. GILBERT: Your Honor, very briefly.

We feel that the Defendants will not sustain a burden of defending the discrimination at Bar.

[6] We contemplate that the Court may reject these statistics which they offer, or in any event, will find them unpersuasive.

If the Court does find they have made an arguable defense, we do intend to call two witnesses. Dr. Joseph Ruffin, who is seated at counsel table, and Dr. Ben Jones, of the Oklahoma University Medical School, who will offer expert testimony that there is no rational basis known to medical or psychiatric science for the discrimination in question.

I would advise that the parties, the Plaintiffs themselves, will not personally be present since all facts of relevancy regarding their standing have already been stipulated to.

JUDGE HOLLOWAY: Very well.

The Defendants may proceed.

MR. MOORE: Thank you, Your Honor.

I would like to call Mr. Don Wallock.

DONALD M. WALLOCK, JR.,

having first been duly sworn upon his oath, took the witness stand and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. MOORE:

Q What is your full name, please?

A Donald M. Wallock, Jr.

[7] Q What is your occupation, sir?

A I am an agent supervisor with the Oklahoma

State Bureau of Investigation. I am a supervisor of the Uniform Crime Reporting Division.

Q And how long have you held that position with the State Bureau?

A Four years.

Q And could you describe precisely, as best you are able, the duties of your specific function within the agency?

A We collect crime statistics from police departments, sheriffs' offices around the State of Oklahoma. These are arrest statistics.

Q Are you required by State law to do that?

A Yes, sir, by the State Statute.

Q Could you describe more particularly, if you are able, the data which you keep?

A I beg your pardon?

Q Could you describe the data, generally, which you keep as a part of your business.

A Okay. We keep the number of crimes, the number of persons arrested for particular crimes, by age, sex and race.

Q For what types of crimes do you keep the statistics?

[8] A All parts of crimes, Part 1 and Part 2 crimes. Part 1 are felony crimes and Part 2 are misdemeanor crimes.

Q Now, I will show you what has been marked as Defendants' Exhibit No. 1 and ask you if you can identify that, please.

A Yes, sir. These are statistics that I gathered relating to alcohol related offenses for males and females, 18 through 21 years of age.

Q Does your signature appear at the bottom of this report?

A It does.

Q Was this report prepared at my request and from your records at the Bureau?

A It was.

Q Where are the original records which gave the basis for this report?

A In my custody at the Bureau.

Q Is this a true and accurate copy of the original records which are now located at the Bureau?

A It is.

Q This report was prepared under your direct supervision?

A That is correct.

Q Now, I notice from looking at the face of the

[9] report, that it shows that it is for the months of September, October, November and December of 1973. Why is that?

A At this time, or starting with the month of September, 1973, the Oklahoma Bureau of Investigation assumed the responsibilities for collecting these statistics. Prior to this time, these statistics were collected by the Federal Bureau of Investigation.

Q Do you report these statistics to the Federal Government?

A I do.

Q Do they require such statistics be reported?

A They do.

Q Now, I notice also from the face of the report that this shows persons who are arrested only. Why does this report not show the disposition of those arrests, if you're able to tell the Court?

A This is a new program. The difficulty of obtaining disposition on these cases is tremendous. We will get the disposition on the cases at the end of the year. This is a once-a-year statistic that we do collect. At the

end of 1974 we will collect the disposition of the number of people arrested.

Q But, that has not been done at this time?

A Not at this time.

[10] Q I would ask that Defendants' Exhibit No. 1 be admitted into evidence.

JUDGE HOLLOWAY: The Defendants examined it?

Or the Plaintiffs?

MR. GILBERT: Your Honor, we have waived hearsay objection. I do have an objection regarding relevance. I can either present that at this time or at some future time, according to the Court's convenience.

JUDGE HOLLOWAY: I think you better make your objection now.

MR. GILBERT: Yes, very well. Your Honor, I object to these statistics as being irrelevant for a number of reasons, one of which they are merely arrest statistics and not conviction statistics and the arrests are virtually indistinguishable from the mere accusation,[1] the mere facts that more males, 18 through 21, are accused of drunkenness or alcohol-related offenses, is completely immaterial. What could be material is whether or not they have been convicted more often.

Furthermore, these offenses are not categorized as to whether, as to what kind of liquor they are derived from. Whether this is a hard liquor, in excess of 3.2 percent alcohol, or what is called nonintoxicating liquor, of 3.2 percent or less.

Now, what this case involves is the discrimination, [11] in nonintoxicating liquor. There is no discrimination, as far as I know, in the law books of Oklahoma regarding hard liquor. That is nondiscriminatory. So,

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[1]"Acquisition" appears in the original.

these statistics could very well be, for all we know, reflecting to the type of liquor which is not involved in this lawsuit.

Furthermore, there is no, unless there is going to be connection up with other evidence, as to show what the percentage of males to females actually driving might be, we don't know whether these statistics are disproportionate or not.

It may be, I just look at the statistics, they seem to show generally that males seem to be accused of alcohol-related offenses about ten times more often than females. Unless there is some showing that there is actually an equal amount of miles driven, we can't tell just from the face of these statistics, whether there is a disproportionality in the sense of this discrimination.

Furthermore, there is another difficulty, Your Honor. For instance, under the driving under the influence, just taking[2] that as an example, we see total persons arrested. Well, 152 plus 107 plus 168. I have that tabulated here somewhere. I believe it is—yes, okay. Whatever that total comes out to be, 427. We can't tell from these statistics whether, for instance, one person has been arrested 427 times or whether it is 427 different males who have been [12] arrested one time apiece.

If we can't tell that, we just can't really tell what that figure really means. Even assuming it did result in an actual conviction for 3.2 percent alcohol in particular.

Furthermore, I would suggest that there is no showing whether or not there may be a discriminatory attitude or practice of law enforcement personnel to selectively prosecute against males in that teen-age, in that—yes, in that teen-age group as opposed to females. There may be, I submit, a folk myth around that males in that

[2]"Saying" appears in the original.

age category are naturally rowdy and therefore there may be selective discrimination.

My final objection would be, and perhaps I should reserve this for final argument. I submit that at this time and day, constitutional development in the United States, that it doesn't make any difference if there is some kind of a statistical behavior difference between males and females. The time has come when the equal protection law means that it has been interpreted to mean what it says, no matter how you differentiate it or split the two groups of people. There is always going to be some statistical fluctuation between the two groups.

If you could split between black and white there would be some statistical difference or between [13] Protestants or Catholics or Republicans or Democrats.

JUDGE HOLLOWAY: I believe you have stated your position and we can let you argue further. If those are the grounds of your objections as stated, the Court can rule on those.

Is there any other ground you have not covered yet?

MR. GILBERT: Yes, sir, one.

We don't know that the total population is in this whole group, in this 5400 or this 427 arrests, according to my statistics, since it is statistics, discloses that that figure is just about one percent of the total male population of that age category and is just de minimis, as a matter of law, as a basis of condemning the other 99 percent.

MR. MOORE: Your Honor, may I make an additional statement?

I didn't want to interrupt the Court.

JUDGE HOLLOWAY: I don't believe it will prove necessary. Let us clear some matters up with counsel, if you please, Mr. Moore, and then we will wait and see if you need to respond.

Mr. Gilbert.

MR. GILBERT: Yes, sir.

JUDGE HOLLOWAY: You indicated you were not [14] objecting on the grounds of hearsay and we somewhat interpret that to me you don't object to this form of summary testimony by virtue of the fact that the original records are not here for your examination.

MR. GILBERT: That is correct, Your Honor.

JUDGE HOLLOWAY: The grounds are as stated. Irrelevance, or that it is incompetent under the constitutional standards.

Well, I am not trying to phrase it for you. The grounds that you are indicating, though, you're not objecting to the form of the evidence?

MR. GILBERT: No, I am waiving the hearsay.

JUDGE HOLLOWAY: All right, and summary form that counsel is introducing it by.

What I mean is, he has an accounting summary virtually here.

MR. GILBERT: No, I don't object on that aspect. I am just, my objection is that they're irrelevant rather than incompetent.

JUDGE HOLLOWAY: Very well, the objection will be overruled. The Court is all of the opinion that the evidence should be admitted. It is competent, and considered by the Court. The matters that you have argued going to its weight will be considered.

MR. GILBERT: Very well, Your Honor.

[15] MR. MOORE: Thank you, Your Honor.

I might just point out in passing that the Statute, I believe, which is in point on admissibility of all this evidence is Title 28, United States Code, Section 1732, which sets forth the so-called Shop Book Rule which makes admissible into evidence, official records of governmental agencies, State, Federal and County. If they

are kept in the ordinary course of their functions and business.

I would just state that very briefly.

JUDGE HOLLOWAY: Very well, thank you.

MR. MOORE: Also, the Court Rule, Federal Court Rule, Civil Procedure Rule 44 (A-1).

Q Now, Mr. Wallock, from the records of the department and the report before you, which you have in front of you, very briefly, you have that categorized in terms of three offenses as they relate to alcohol. Is that correct?

A That is correct.

JUDGE HOLLOWAY: Counsel, pardon me, just a moment.

Do you have any copies of this exhibit?

MR. MOORE: Oh, yes, I am very sorry.

JUDGE HOLLOWAY: If you would give them to the Clerk and we could be referring to them.

[16] Do you have other exhibits, Mr. Moore, you will be following with?

MR. MOORE: Yes, sir, I do.

JUDGE HOLLOWAY: Very well.

BY MR. MOORE:

Q The first one of those offenses, I believe is driving under the influence.

Now, that is a violation of Oklahoma Statutes. Is that correct?

A That is correct.

Q And you have these offenses categorized by ages, 18 through 21, respectively. Is that correct?

A That is correct.

Q For the years, for the age 18 years, what were the breakdown of the male and female arrests for the crime of driving under the influence?

A 152 males were arrested, 14 females.

Q And for the age 19 years?
A 107 males, 2 females.
Q And for the age 20 years?
A 168 males, 8 females.
Q And for the age 21?
A 166 males, 13 females.
Q All right, now, the next offense which is described in the report is so-called liquors laws. What does [17] that involve?
A That involves—
MR. GILBERT: Excuse me. May I say another formal objection for the record, Your Honor.
According to the Pre-Trial Order, it was my understanding that the defense of the statute would be based on the statistics regarding to driving while intoxicated.
I think the other two categories of statistics would be irrelevant for that purpose. He has the DWI statistics, I think that is sufficient.
JUDGE HOLLOWAY: Well, are you claiming surprise or any objection because of the pretrial order term?
MR. GILBERT: No, Your Honor.
JUDGE HOLLOWAY: You're just claiming they're irrelevant?
MR. GILBERT: Yes, Your Honor.
JUDGE HOLLOWAY: Well, that question we have considered and do overrule.
MR. GILBERT: All right.
BY MR. MOORE:
Q What are the offenses which come under the heading of liquor laws, please?
A Possession of alcohol by minors, open bottle.
Q Operating an open saloon?
[18] A Operating an open saloon. Working in a saloon.

Q So, this is just kind of a general catchall for all other liquor violations?
A That is correct.
Q Does this include State offenses as well as violations of municipal ordinances?
A Correct.
Q Does the former, driving under the influence—
A Yes, sir.
Q What are the breakdowns for 18 years of age, male and female, for the so-called liquor laws violations?
A 119 males, 21 females.
Q Now, moving on, I will try to expedite this, may it please the Court.
Let's go to the last category, drunkenness. What is the offense which is described there?
A That is being under the influence of intoxicating liquor.
Q The so-called public drunk?
A Public drunk, yes.
Q What is the breakdown, male and female, for the 18 years of age group?
A Male, 340; female, 39.
Q And for the drunkenness category, 19 years?
A 321 males, 33 females.
Q Twenty years?
A 305 males, 30 females.
Q Twenty-one years?
A 377 males, 34 females.
Q Now, just one additional question, Mr. Wallock. What is your population coverage on these statistics?
A 84 percent population coverage.
Q And how many enforcement entities do you have reporting to you on this data?
A 64 sheriffs' departments and 130 police depart-

ments in the State of Oklahoma.

Q So, by your calculation, 84 percent of the Oklahoma population is covered by this statistic which you have here?

A That is correct.

Q I have no further questions at this time.

JUDGE HOLLOWAY: May I ask you, what do you mean by the other 16 percent?

How are they not covered?

A Those are not reporting departments, Your Honor. Those are departments that did not report to us during this particular period.

JUDGE HOLLOWAY: You mean areas of the State, geographical areas?

A Yes, sir.

[20] JUDGE HOLLOWAY: I see.

Any cross examination?

MR. GILBERT: Yes, very briefly.

CROSS EXAMINATION

BY MR. GILBERT:

Q Mr. Wallock, I believe under the heading of Liquor Laws, you said that could include such offenses as illegally working in a beer joint?

A That is correct.

Q Are you not aware, sir, that a female may work in a place which sells 3.2 percent beer at age 18 and a male is prohibited therefrom until 21?

A I am aware of that, yes.

Q And in view of that statutory discrimination, that could affect the way these statistics look from a male and female who do the exact same physical acts?

A That is correct.

Q That is, a female of 19 could work in a bar and this would not reflect as a violation on these statistics,

but a male could be doing the same work in the same bar and that would reflect as a violation?

A That is correct.

Q Do you know to what extent that type of discrimination is affecting, or has affected,[3] these statistics?

A I have no way of knowing.

[21] Q I see. No further cross examination.

MR. GILBERT: I would raise what I have just raised as a further objection to Line 2, Liquor Laws.

JUDGE HOLLOWAY: Let me ask you, please.

Do you have the figures available with you about what part of these figures are the violations that counsel is inquiring about?

A There is no breakdown of that, Your Honor, of that particular violation. It is all lumped under Liquor Law Violations. The reports that I receive lump them all under one category.

JUDGE HOLLOWAY: Well, the renewed objection is overruled. The Court, realizing the weakening of the exhibit by the evidence developed, but it, we determine goes to the weight again.

MR. MOORE: Just one very quick additional questions now.

REDIRECT EXAMINATION

BY MR. MOORE:

Q These, all of the classifications are in very broad categories. Who establishes these broad categories? Did you establish them?

A I did not. The FBI established what they, what type of offenses they wanted them for.

Q But, driving under the influence and drunkenness [22] are very specific violations and specific statutes?

[3] "In effect" appears in the original.

A That is correct.

Q That is all I have for this witness.

JUDGE HOLLOWAY: Anything further from this witness?

MR. GILBERT: Nothing further, Your Honor.

JUDGE HOLLOWAY: May he be excused?

MR. MOORE: Yes, I would ask he be excused.

JUDGE HOLLOWAY: Any objections?

MR. GILBERT: No, Your Honor.

JUDGE HOLLOWAY: You may step down and you are excused from attendance on the court.

MR. MOORE: We will call Phil Ballard, please.

PHIL BALLARD,

having first been duly sworn upon his oath, took the witness stand and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. MOORE:

Q State your name, please.

A Phillip G. Ballard.

Q And what is your occupation?

A Lieutenant, Oklahoma City Police Department.

Q How long have you worked for the Oklahoma City Police Department?

A Ten years.

[23] Q What is your present position within the department?

A Planning and Research, which covers statistics of our department.

Q Could you be more specific, if you can. Your precise duties as head of the Planning and Statistics Division in the department.

A Well, we record all arrest data and make uniform crime reports to the State which is forwarded to the FBI now.

Q Reports are prepared for the purposes of forwarding to the FBI, Federal Bureau of Investigation?

A Yes, sir.

Q Is that done on a uniform basis?

A Yes, sir.

Q I have set in front of you what has been marked as Defendants' Exhibit No. 2 and ask you if you can identify them.

A Yes, sir.

That is a copy of our form that we sent in to the FBI covering the year 1973.

Q That is a copy of the report which you prepared as a part of the business of your department and function within the department; is that correct?

A Yes, sir.

[24] Q Is it a true and accurate copy of the original report which you prepared?

A Yes, sir, it is.

Q Was a report prepared directly under your supervision?

A Yes, sir, it was.

Q Where is the original copy of that report?

A I, the original copy was sent to Washington.

Q To the Federal Bureau of Investigation?

A Yes, sir.

Q And you retained a copy in your files, is that correct?

A Yes, sir.

Q Does a copy which you have retained in your files, coincide exactly with a copy which is marked Defendants' Exhibit No. 2?

A Yes, sir, it does.

Q So, let me ask you just one more time. Do you identify this report as a true and accurate copy of the original report which you mailed to the FBI?

A Yes, sir.

Q I will ask that Defendants' Exhibit No. 2 be admitted into evidence.

JUDGE HOLLOWAY: Has counsel examined this one?

MR. GILBERT: Yes, Your Honor. I would make the [25] same objections as to the exhibit.

JUDGE HOLLOWAY: Very well. On the same ruling as previously announced, the objection is overruled.
BY MR. MOORE:

Q Now, Lieutenant Ballard, there are numerous categories described upon this report. Before I get into that, what does, from where did the data in this report come?

A They're taken from the booking slips when the person actually booked into the City Jail.

Q Is this a compilation of all the data of arrests made by the Oklahoma City Police Department?

A Yes, sir.

Q And would that, so this would cover all the arrests which took place within the City of Oklahoma City. Is that correct?

A By Oklahoma City Police officers.

Q And for what time frame are we dealing?

A Calendar year, 1973.

Q So, Defendants' Exhibit No. 2 is a record of calendar year 1973, of arrests by the Oklahoma City Police Department?

A Yes, sir.

Q Now, do you know, on Item 21, what is the offense described by that classification?

[26] A Driving under the influence.

Q Is this, as you report the data, is this for a violation of the State laws or the City ordinances, or both?

A Both.

Q Okay. Now, what, generally, did you hear Mr. Wallock testify, would your testimony as to the offenses contained in the liquor laws, would that be the same as Mr. Wallock's?

A Yes, sir.

Q It is a catchall classification?

A Right.

Q And also, drunkenness, is that a violation of both the State laws and the municipal ordinances of Oklahoma City?

A Right.

Q And violations for both would be included in this report?

A Yes, sir.

Q Now, the number of arrests — incidentally, this does show only arrests. Why does it not show dispositions?

A Well, it is — we do make the dispositions, but they're not broken down into age categories. It would be almost impossible for the total work and we have never had the occasion to do it before. And therefore, we do not even [27] attempt to keep dispositions as to age groups.

Q Is this the only data which the FBI requires from you at this time?

A Yes.

Q Now, does your report break down the number of arrests by age and sex groups?

A Yes, sir, it does.

Q Specifically directing your attention to Item No. 21, the age group 18 years of age, what were the number of arrests by male and female offenders?

A Age group 18, there were 47 males and ten females.

Q And age group 19?
A 54 males and one female.
Q Age group 20?
A 72 males and five females.
Q And age group 21?
A 86 males and four females.
Q Now, dropping down to Item No. 23, which is the so-called public drunk violation, what are, what is the male and female breakdown for age group 18?
A 18, 120 males and 18 females.
Q And 19?
A 104 males, 22 females.
Q And age 20?
[28] A 96 males and 19 females.
Q And age 21?
A 146 males and 16 females.
Q That is all the questions I have at this time of this witness.

CROSS EXAMINATION

BY MR. GILBERT:

Q Officer, on my Xerox copy, up at the top where the two pages are joined together, I have a break that is a little hard to read. There is some italicized print in parenthesis that says—would you read that to me, please.

A Yes.

"Includes those released without having been formally charged."

Q Thank you. Now, Officer, I believe you stated under the heading of Liquor Laws, this is sort of a catchall category which includes everything relating to alcohol that is not either public drunk or DWI.

A Yes, sir.

Q Does that include an Oklahoma City ordinance as well as State statutes?

A Yes.

Q All right. Does Oklahoma City have a possession of beer by a minor ordinance?

[29] A Yes.

Q And what is classified as a minor for possession of beer under that ordinance, if you know, sir?

A I believe it is under 18 for females and 21 for males.

Q And you are aware that there is a State Statute that a female may work in a bar at 18, but a male is prohibited from such work until 21?

A Well, I am aware of the 18. I really can't say I am aware of the one for 21 for the male.

Q I see. Well, under the Oklahoma City Ordinance, the female at 19 could, say, possess beer and that possession would not show up as a violation of the liquor laws, would it?

A That is right.

Q But, if a male, 19, were to possess liquor it would show up as a violation. Is that correct?

A Yes, sir.

Q All right. Do you know, Officer, to what extent this discriminatory statute or ordinance is having an effect upon the seemingly disparate[4] statistics under Item 22, Liquor Laws?

A I would have no idea.

Q All right. Now, Officer, under Item 21, Driving Under the Influence, I believe you testified for male [30] arrests at 18 was 47; age 19, 54; and age 21, 72. Is that correct?

A Yes, sir.

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[4]"Disparaged" appears in the original.

Q All right, Officer, just looking at those statistics, it seems to me as though there is a significant jump at age 21 and beyond for male arrests. Is that correct?

A There is a jump.

Q All right. Do I understand from that, Officer, that as far as your statistics reflect, there is less then a problem of DWI for males 19, 19 and 20, than there is for males 21 and above?

A Well, sir, I wouldn't be able to answer that question without showing or knowing the basis of the population and percentage given.

Q Let's say just on the basis of these statistics.

A There is more arrests for age 21 than there was for 20.

Q Would that indicate that there is more of a problem for male DWI at age 21 than above?

A Sir, I wouldn't necessarily think so.

Q It is possible?

A It is possible.

Q All right. Now, I will ask the same question under Line 23, Drunkenness. I notice, I believe you testified [31] that for a, the offense of public drunk at age 18, you had 102 male arrests and at age 19, 104, and age 20, 96. Is that correct?

A Yes, sir.

Q On my copy of the statistics, I notice a significant jump at age 21 and beyond. Is that correct?

A Yes, sir.

Q Do I understand from these statistics, then, Officer, there is considerably less problem with public drunk among males 18 than there is with males 21 and beyond?

A Sir, all I can say is our statistics jumped from that age category. I couldn't say that there is less of a problem.

A I consider —

A I couldn't say there was less of a problem.

Q It is possible, though?

A It is possible.

Q All right. And I would ask your answer would be the same under Line 22, Liquor Laws? Well, that is a little bit different. Never mind, I will withdraw that question.

I understand that, for instance, let me ask one qualifying question.

Under Line 22, Liquor Laws, I do notice that [32] there seem to be more arrests for males 18 to 20 than for the immediate years beyond. Is it possible, Officer, that that offense of possession by beer, beer by a minor, could be influencing those statistics?

A Yes, sir, that and minor private clubs.

Q All right. No further cross examination, Your Honor.

REDIRECT EXAMINATION

BY MR. MOORE:

Q I would like to clarify one point just very briefly, if I may.

Lieutenant Ballard, is there any age distinction in the offenses of driving while intoxicated? There is no age requirement, you're guilty of the offense if you are five or sixty-five. Is that not correct?

A That is correct.

Q Would the same be true for public drunk?

A Yes.

Q That is all I have of this witness.

JUDGE HOLLOWAY: Anything further?

MR. GILBERT: No, Your Honor.

JUDGE HOLLOWAY: May he be excused?

MR. MOORE: I would request he be excused.

JUDGE HOLLOWAY: Is there any objections?

MR. GILBERT: No objections, Your Honor.

[33] JUDGE HOLLOWAY: You may be excused, Mr. Ballard.

MR. MOORE: Your Honor, that is all of the witnesses which I intend to put on.

There are other items of evidence which I would like to have introduced into evidence, however.

JUDGE HOLLOWAY: Very well.

MR. MOORE: I am kind of uncertain as to the procedure. They do have no supporting testimony, so I would assume that I would just offer the exhibit and make whatever statements I think is appropriate and naturally counsel can respond.

JUDGE HOLLOWAY: Have you furnished counsel with these exhibits?

MR. MOORE: Yes, I have.

MR. GILBERT: Yes, Your Honor.

JUDGE HOLLOWAY: Will there be objections to them?

MR. GILBERT: There will be no hearsay objections. My only other objections will be the same objections regarding relevancy and materiality that I have previously stated.

JUDGE HOLLOWAY: Why don't you make a statement identifying the exhibit by number and tell us in substance what it is and we will make the record here.

MR. MOORE: Thank you very much, Your Honor.

[34] What is marked as Defendants' Exhibit No. 3 which has previously been furnished a copy to counsel, at least a month ago, perhaps longer, is a study made by OMEC, Incorporated. OMEC, Incorporated, is a Norman corporation comprised of four doctors at OU. They have a contract with the Alcohol Safety Action Program, the local ASAP program operated here in

Oklahoma City, to conduct research and evaluate data.

JUDGE EUBANKS: Well, are these the M.D. type doctors?

MR. MOORE: No, sir, they are Ph.D.'s.

JUDGE EUBANKS: All right.

MR. MOORE: Whose statistical backgrounds, and the study by OMEC, Incorporated, is a part of roadside surveys which they conducted as a course of their regular business pursuant to the contract with ASAP.

There is a cover letter with the report which generally describes the procedure which was followed.

Dr. Krenek, the person who extracted this data from the files of OMEC, Incorporated, is out of town and could not be here today and I did not feel it desirable to subpeona him, especially in view of the fact that counsel has had the statistics for many months and has waived his hearsay objections.

I would like to move the admission of Defendants' [35] Exhibit No. 3 into evidence, at which time I would make additional comments.

JUDGE HOLLOWAY: Is there any objections to the Defendants' Exhibit No. 3?

MR. GILBERT: No hearsay objection, Your Honor, but the previous objections would apply to this exhibit also.

JUDGE HOLLOWAY: The Court's ruling is the same. The objection will be overruled.

MR. MOORE: I have furnished the Clerk with three copies. I will wait until they're distributed.

JUDGE HOLLOWAY: The objections as stated is overruled and the Defendants' Exhibit No. 3 is received in evidence and if I did not make the record clear, the Defendants' Exhibit No. 1 and 2 are also received in evidence. The objection is being overruled.

MR. MOORE: Thank you, Your Honor.

As I said, pursuant to their contract with ASAP, OMEC conducted a roadside survey during the years of 1972 and 1973. As you can see from the cover letter there —

JUDGE HOLLOWAY: Counsel, just a minute. I believe your remarks now are getting into argument. In other words, the exhibit is in evidence without objections and the Court will read it. If you want to allude to it [36] during your argument, why, that will be fine. We can proceed with the evidence at this time. Do you have any other exhibits?

MR. MOORE: Yes, sir. I would like to offer into evidence Defendants' Exhibit No. 4 and Defendants' Exhibit No. 5, both documents of which are summaries of the —

JUDGE HOLLOWAY: Well, we better take them one at a time, if you will, and describe it generally for us and then pause for objections.

MR. MOORE: Yes, Your Honor.

Defendants' Exhibit No. 4 is a report published by the Oklahoma Department of Public Safety. During the course of their business they publish these reports yearly. They are distributed to the public, to anyone who requests them and are published pursuant to State Statute as part of their statistical data which they provide for anyone needing the data and to the public at large.

The report is a nine, ten page report which covers all their various breakdowns regarding collection and by age groups and sex groups.

The exhibit and page number which I am particularly interested in is Page 7 of the report, which shows the male and female drivers killed, injured by age group and sex group. It does not show them by levels of intoxication.

[37] My sole purpose for offering this exhibit is to show

the, I think the exhibit is useful in that it shows the number of accidents to which people in this age group are involved, which admittedly, not being specifically on point, I think is relevant and should be considered by the Court along with the other exhibits in the case.

JUDGE HOLLOWAY: Now, you're offering, you mentioned special items in Page 7. You're offering the entire report or just the page?

MR. MOORE: I would offer the entire report.

JUDGE HOLLOWAY: Very well. Is there any objections?

MR. GILBERT: No hearsay objection, Your Honor. I do offer the previous objections. I would also add that statistics regarding injuries are completely irrelevant as to question of culpability.

JUDGE HOLLOWAY: The objection is overruled and the Defendants' Exhibit 4 is admitted in evidence and received in evidence.

MR. MOORE: Defendants' Exhibit No. 4 covers the fiscal year, pardon me, calendar year 1972.

Defendants' Exhibit No. 5 is an identical report for calendar year 1973.

I would ask that it be admitted also.

[38] JUDGE HOLLOWAY: Is there any objections to the Defendants' Exhibit No. 5?

MR. GILBERT: Your Honor, I am sure it will just be the same objections. I haven't received a copy, but I will just make the same objections as before, Your Honor.

JUDGE HOLLOWAY: Very well. The same ruling of the Court applies. The objection is overruled and the Defendants' Exhibit No. 5 is received in evidence.

MR. MOORE: Does the Court desire copies of both of the exhibits?

JUDGE HOLLOWAY: Yes, please. It would be convenient if you have three.

MR. MOORE: Yes, sir, I do.

The next exhibit, the next exhibit, again without supporting testimony, which I would like to offer into evidence, Defendants' Exhibit No. 6, is a report issued by Clarence M. Kelly, the Director of the Federal Bureau of Investigation, a report published by the Bureau and distributed in the course of its business.

Particularly, I would direct the Court's attention to Page 123 and Page 129 of which I have distributed a copy to counsel. I would ask that Defendants' Exhibit No. 6, the report of the Federal Bureau of Investigation be admitted into evidence.

[39] Are you offering the entire report or just the pages you refer to?

MR. MOORE: To expedite it, I would offer the two pages to which I have referred.

JUDGE HOLLOWAY: Perhaps we better have a cover page which shows the date. Isn't there a transmittal letter from those reports, usually, to the President or the Attorney General?

MR. MOORE: No, sir. All I have in my possession is just the report as I have it in my hand.

JUDGE HOLLOWAY: Very well. You maybe better include the cover for identification. Just describe it. I mean, that is what we will say in the record, that you're offering the Pages 123 and 129 and the cover.

MR. MOORE: Yes, sir, that is correct.

JUDGE HOLLOWAY: Very well. Any objections to the Defendants' Exhibit No. 6?

MR. GILBERT: It would be the same objection, Your Honor.

JUDGE HOLLOWAY: I would just inquire of counsel, what it is on Page 123 that he is inviting

attention to. Do you want to indicate to the Court what the relevance of that Page 123 is?

MR. MOORE: Yes, Your Honor.

Well, on Page 123 is Table 129 — I am sorry, I [40] do not have copies to the Court. I have one Xerox and one original. It shows the same classification of the crimes under the Uniform Crime Reporting System as have been testified to by the previous two witnesses.

The offenses of DWI, Liquor Laws and Drunkenness. It shows for the years '67 and '72, it shows the arrest trends from those two years for people under age 18 years of age, not distinguished by sex, to people over 18 years of age.

The exhibit is offered solely for the purposes of showing the trend of crime, if you will, for these offenses over the last five-year period.

JUDGE HOLLOWAY: Very well.

Do you have objections now to Defendants' Exhibit No. 6 consisting of the cover of the report and Pages 123 and 129.

MR. GILBERT: No hearsay objections, Your Honor. My same objection on relevancy.

JUDGE HOLLOWAY: Very well. The objection is overruled and the exhibit consisting of the cover and Pages 123 and 129 of the FBI report — what year was that, please?

MR. MOORE: Year 1972.

JUDGE HOLLOWAY: For 1972, is admitted in evidence.

[41] MR. MOORE: I would apologize to the Court, that is the only copy I have. I would be more than happy to leave this with the Court if they desire.

JUDGE HOLLOWAY: Well, we will have to have — oh, you have made Xerox copies of the pages?

MR. MOORE: Yes, Your Honor. I have one copy.

JUDGE HOLLOWAY: Well, all of us of the Court have that report, I believe, so we will be all right.

MR. MOORE: Okay. Fine.

JUDGE HOLLOWAY: Thank you.

MR. MOORE: The next exhibit I would like to offer is Defendants' Exhibit No. 7 is a report published by the Department of Public Safety, which bears the emblem and seal of the Department with specific reference to Table 4 at Page 7 of the report, which shows driver fatalities by a function of blood alcohol concentration, sex and age.

The sole purpose for requesting the admission of the Minnesota[5] report, is to show that the Oklahoma statistics are at least in line with statistics in other states.

JUDGE HOLLOWAY: Very well. Is there any objections to the Defendants' Exhibit No. 7?

MR. GILBERT: Just the same objections as before, Your Honor.

JUDGE HOLLOWAY: The objection is overruled and the Exhibit No. 7 is received in evidence.

[42] MR. MOORE: Defendants would next like to have admitted in evidence Defendants' Exhibit No. 8. It is a publication entitled, Proceedings of Joint Conference on Alcohol Abuse and Alcoholism. A study financed under the auspices of the U. S. Department of Health, Education and Welfare, U. S. Department of Justice and U. S. Department of Transportation.

There are statistics in the documents which I believe might be relevant to the case at Bar.

The document makes reference to several studies conducted within the last 20 years.

I would specifically invite the Court's attention to Pages 124 through 127, which is a commentary on the study conducted in the State of Michigan where certain

[5]"Minimum" appears in the original.

graphs were made from the data.

JUDGE HOLLOWAY: Well, we don't want to be obliged to read the entire book. If you don't have an interest in it for evidence — what is it, are those just the only pages you're concerned with, 124 to 127?

MR. MOORE: That is correct, Your Honor.

JUDGE HOLLOWAY: Why don't you just offer those parts of it and the cover, so that we are not obliged to examine any further.

MR. MOORE: Very fine. I would ask that Defendants' Exhibit No. 8 be the cover page and Pages 124 [43] through 127 of the report of the Federal Government. I would ask it be admitted into evidence.

JUDGE HOLLOWAY: Is there any objections to Defendants' No. 8?

MR. GILBERT: Same objections as before, Your Honor.

JUDGE HOLLOWAY: Very well, the ruling is the same. The objection is overruled and the Defendants' Exhibit No. 8, consisting of the cover and Page 124 to 127 of the exhibit is received in evidence.

MR. MOORE: Your Honor, I do not have the extract Xeroxed. May I request leave of the Court to substitute a Xerox extraction, in lieu of the complete document.

JUDGE HOLLOWAY: Yes, You may do that.

MR. MOORE: Thank you. Your Honor, that is all the evidence I wish to present at this time. The Defendants rest.

JUDGE HOLLOWAY: Very well. You may proceed.

MR. GILBERT: Your Honor, I am not quite certain how to style the motion or the argument I wish to make.

In plain English, it would be Motion to Demur.

JUDGE HOLLOWAY: We call that a Motion to

Dismiss under Rule 42.

MR. GILBERT: Well, it wouldn't be to dismiss, [44] because we are Plaintiffs.

JUDGE HOLLOWAY: That is right.

MR. GILBERT: Let's call it a Motion for Judgment.

JUDGE HOLLOWAY: Very well.

MR. GILBERT: To outline the argument, the Court may indicate it would prefer to consider this after the conclusion of all evidence.

To outline the argument, I would show that the statistics, even interpreting them in the worst light to the Plaintiffs, that arrests mean convictions and that the figure, 427, means 427 separate individuals, et cetera, et cetera — still, it indicates that at most, there is a population, there is a problem with no more than about 2 percent of the male population, 18 to 20.

Further, that the statistics which the Defendants themselves have introduced, show that there is a jump or an increase of alcohol related problems with males once they achieve 21 and/or older.

I would argue that on the basis of modern constitutional law, it is improper and impermissible to condemn an entire sex because of a characteristic displayed by so few as 2 percent of the population.

Furthermore, it is irrational to discriminate [45] against males 18 to 21 when by the very statistics relied upon by the State, that age category displays the less amount of problem related to alcohol.

If we are going to discriminate against some class of males, it should be males 21 and above, not males 18 to 20.

In support of the argument I will just cite a couple of very recent cases.

In the case of Cleveland Board of Education versus LaFleur, which was decided by the Supreme Court just

this January. Now, that is the pregnant teacher's case. The Supreme Court said the mere fact that some women, when pregnant, are physically incapacitated from teaching school, does not mean that all women are incapacitated from teaching school and that any statute which imposes a sexual sterotype upon the entire class or upon an entire group of people for purely biological or anatomical reasons, just blanket[6], without any regard to individual capabilities, is unconstitutional as a violation of the due process.

JUDGE HOLLOWAY: Counsel, just a moment.

The Court is aware of the case law and of your position which you have made perfectly clear. The motion will be overruled. The Court will permit you to develop your authorities and your arguments actually after the [46] evidence is heard, but we feel we should hear your evidence, if you wish to present it, and the Motion for Judgment is by the entire panel overruled.

MR. GILBERT: Very well.

Your Honor, I would call as the Plaintiffs' first witness, Dr. Joseph Ruffin, M.D.

DR. JOSEPH RUFFIN, M.D.,

having first been duly sworn upon his oath, took the witness stand and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. GILBERT:

Q Would you state your name and address to the Court, please.

A Joseph Ruffin, 400 Northwest 16th, Oklahoma City.

Q And what is your business, trade or profession, sir?

A I am a physician, specifically a psychiatrist.

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[6]"Blank" appears in the original.

Q And how long have you been practicing the profession of medicine or psychiatry, sir?

A Well, practicing medicine since 1953, psychiatry, in private practice since 1965.

Q Are you licensed to practice medicine by the State of Oklahoma?

A Yes, sir.

[47] Q Would you state your academic degrees and qualifications, Doctor?

A A Bachelor's Degree from the University of Illinois. Primarily in the areas of biology and chemistry. An M.D. from the School[7] of Medicine, Loyola University in Chicago, in 1953.

Q Where did you do your internship, sir?

A At William Beaumont Hospital in El Paso, in 1953.

A All right. Were you an Army doctor?

A For a period of three years, yes, sir.

A All right. Have you ever, have you ever undergone any residency?

A Oh, yes. Two. One is a subspecialty of preventive medicine called Occupational Medicine and Industrial Hygiene, and then subsequent to that I came here to Oklahoma from 1962 to 1965, I was training in psychiatry.

Q Doctor, in your course of scientific studies, have you ever had occasion to study what is commonly called organic chemistry?

A Oh, yes.

Q All right. And, Doctor, in your studies and qualifications to be a doctor, a preventive physician and a psychiatrist, have you ever studied a phenomenon or disease known as alcoholism?

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[7]"Strict" appears in the original.

[48] A Quite a bit.

Q Are you familiar with the causes, symptoms and treatments and social problems caused by the disease of alcoholism?

A Very much.

Q Doctor, in your course of studies, have you ever taken courses involving the study of the sexual hormones or the difference between the respective sexes?

A Yes, sir. That comes up quite frequently.

Q And have you ever studied the psychiatry or the psychology of the adolescent and the young adult?

A Yes.

Q May it please the Court, subject to cross voir dire, I would move to have this witness qualified as an expert witness, competent to express his expert opinion on matters of a biological and psychological nature.

JUDGE HOLLOWAY: Very well. Are the qualifications admitted?

MR. MOORE: Yes, sir, they are.

BY MR. GILBERT:

Q Doctor, to commence your testimony in chief now, are you familiar with the substance known as ethyl alcohol?

A Yes, sir.

Q Would you tell the Court generally what ethyl [49] alcohol is and what its significance to human society is.

A Well, ethyl alcohol is, oh, ethyl alcohol is one of the simpler short-chain alcohols, I mean having two carbons.

Q Feel free to make a drawing.

A Two carbons, and what distinguishes an alcohol is its so-called hydroxin. There are many, many alcohols, but this is ethanol.

Q All right. Could you state some other common

names for ethyl alcohol as we understand them in English?

A Well, you want generally speaking, when we talk about alcohol, this is what we are referring to, ethanol.

A All right, now, is that the same alcohol as alcoholism?

A This is the alcohol of alcoholism, yes. The alcohol that is common to intoxicating beverages.

Q All right, Doctor. Would you explain you your expert language the effect of alcohol upon the human body.

A Okay. Let me say to begin with, that the effect that I am discussing and talking to are those effects upon the central nervous system, central nervous system specifically being the brain and spinal cord, and for the purposes of our discussion, I am discussing effects upon brain or brain tissue.

[50] Central nervous system tissue, this into peripheral nerves that innervate[8] muscles and nerves which sensory impulses originate and are transmitted, so we are talking about central nervous system brain tissue.

MR. MOORE: May I make an objection as to the relevancy of this line of testimony?

JUDGE HOLLOWAY: The objection is overruled.

MR. GILBERT: All right. Your Honor, I think maybe — excuse me, Dr. Ruffin, of course, what we will be driving to later, understand, is the question of sexual differences in the ingestion of alcohol.

A Yes.

Q So, your discussion will be oriented towards that ultimate end, so with that view in mind, explain it to the Court as you feel best.

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[8]"Innovate" appears in the original.

A Okay. I guess the first thing I am aware of is that my discussion is essentially asexual, that is, without sexual references. At least perhaps to the final point at least.

Q Uh-huh.

A Now, let me say, also, that with few exceptions, my best reference for the material that I am alluding to is contained within two volumes titled Actions of Alcohol, by Drs. Wallgran and Barry.

I am prepared to leave these as references.

[51] This is an extraordinary compendium, unbelievably detailed, of all research directed to the actions of alcohol through the year 1970, approximately. It contains every conceivable reference.

MR. MOORE: Excuse me. Will the witness repeat the name of the books, please.

A You want them? I can give them to you.

MR. MOORE: Just the title and authors, please.

A Actions of Alcohol. The authors being Wallgran, W-a-l-l-g-r-a-n, and Barry.

MR. MOORE: Thank you.

A October, 1970.

Now, first, there is the matter of the cellular basis of ethanol on the nervous system and the electrophysiological effects of ethanol upon the nervous system functions have been studied.

Now, very simply, in summary form, what ethanol does is to detroy or at least inhibit or depress the electrical efficiency of nervous tissue. Specifically affecting the behavior of the nerve cell membrane which maintains the charge, that is required for the efficient transportation of the nerve impulse.

In effect, what happens is that ethanol affects the functioning of the nerve cell membrane in such a fashion that the capacity of that nerve cell battery to maintain

[52] the charge and to discharge is impaired[9]. It loses its efficiency in this respect, it becomes depressed.

Now, then there are other effects upon the central nervous system, looking at it in a more global sense.

We can see how electroencephalogram traces indicate regular function of the nervous system becomes depressed.

Other parts of the brain have been studied in more detailed ways, but particularly in lower animals, and again, it is regularly shown that alcohol depresses the electrical functioning of various parts of the nervous system.

There are certainly very little evidence for any stimulant or beneficial effect of anything[10] alcohol does on any sensory capability.

Specific sensory functions have been studied. Specific motor functions have been studied. Specific combinations of sensory and motor functioning have been studied, and in any event, the more complex the task studied, the more ready is the evidence that alcohol does produce a depression or impairment of function.

Lastly, there has been systematic study of complex behavioral effects upon intellectual function. How people behave verbally. Matters of judgment. How their [53] emotionality is influenced by alcohol consumption.

For instance, these have been studied in projective tests. Tests like the "Ink Blot Test" or Rorschach Test are shown that the person under the influence of alcohol becomes increasingly impulsive and superficial and has a tendency to elect risky alternatives, especially in hypothetical situations.

Let me say in summary, and here I refer back again, to the compendium by Wallgran and Barry. There has been a striking absence of systematic sex effect studies as a result of systematic sex effect from alcohol dosage.

[9]"Comparative" appears in the original.
[10]"Any" appear in the original.

There is some evidence, but not much.

Q Let me ask this, Doctor. You define or describe the chemical effect of — first of all, is ethanol the same thing as ethyl alcohol?

A Yes, sir. Ethyl is the two-carbon alcohol.

q. All right. Now, you define the effect of ethyl alcohol as impairing the electrical functioning of nerve cells?

A Yes, sir.

Q Would your statement be true for members of the human species, 18 through 20 years of age?

A Yes.

Q To your knowledge, is there any, either in, to your knowledge, or in the opinion of medical science, is there [54] electrical or anatomical difference in the male and female central system?

A None whatsoever.

Q All right. To your knowledge, is there any difference between males and females and the way that ethyl alcohol gets into the body and is transported throughout the body to the blood or to the nervous system?

A None.

It is absorbed very directly and immediately through the stomach wall. Metabolized almost entirely within the liver.

Q Is that the same for both sexes?

A Yes, sir.

Q Is that the same for all ages, the mechanism?

A Yes.

Q All right. Now, Doctor, sometimes I hear about things called hormones or a chemical difference between male and female.

Could you explain to the Court what that means and whether or not that has any effect upon the, chemi-

cal effect of ethyl alcohol on the central nervous system?

A Well, there certainly are very specific chemical differences between male and female and especially I would guess most distinctively in the matter of the so-called sexual hormones.

[55] Now, there are sex-related hormones that are produced by the adrenal cortex, but the most significant sexual hormones are produced by the sex specific gonads of the male and female.

Again, this is a large — there are large families of these hormones, but essentially the sex hormones produced by the male is one referred to as testosterone. The sex hormone produced by the female is, the female ovary, is estradiol, d-i-o-l, estradiol.

A Is that all one word?

A Yes.

Q Doctor, either in your opinion or in the opinion of medical science, as you understand it or know it, do these sex hormones, testosterone and estradiol, have any effect upon the direction of ethyl alcohol with the function of the central nervous system?

MR. MOORE: Your Honor, I would object to asking any opinion other than his own. His own opinion is fine.

JUDGE HOLLOWAY: The objection is sustained. The question should be confined in this respect to the doctor's own opinon.

BY MR. GILBERT:

Q Doctor, do you have an opinon as to whether or not the sexual hormones that you have mentioned, the varying hormones between the two sexes, have any effect upon [56] the interaction between the central nervous system and ethyl alcohol?

A I would say sexual hormones, specifically, have no such effect.

Q I am sorry?

A Have no such effect.

Q All right. Doctor, let's move from the realm of straight[11] physiology to the realm of psychiatry, or the mind.

With reference to members of the human species, 18 through 20 years of age, is there any evidence or do you have any opinion as to whether or not there is a difference of intelligence between the sexes?

A No difference in intelligence between the sexes from the point of view of formal psychological testing. I have noticed that many, many of my clinical psychologist friends who have considerable expertise in this area are impressed that younger boys — here I am thinking of about children, say, between the 8 and 12, are less interested in the testing situation and so perhaps those are very minor differences and again, by clinical psychologists, not accepted as significant, and my own opinion is, that such differences are really insignificant.

JUDGE HOLLOWAY: Are what?

Are insignificant.

BY MR. GILBERT:

[57] Q Doctor, I sometimes hear a folk myth that girls are more mature than boys or that girls mature earlier than boys. With reference to the human species, specifically 18 to 20, do you have any comments or opinions about this folk myth?

A Okay. Well, when we look closely at that, that phrase, that collection of phrases, it seems to me what people are usually referring to, of course, is, first, the earlier manisfestation of secondary sexual characteristics.

In the developing girl, the girl developing into womanhood — so, this is specifically a physical kind of maturation and the male, you know, runs a couple of

[11] "Trait" appears in the original.

years behind that, two or three.

Secondly, I notice as I have heard people talk about this, they seem to be referring also to the greater propensity, the greater interest that the young woman would have in making marriage, forming a family, the nesting, the interest in nesting, if you would like.

That seems to be what I hear people saying as they talk about the greater maturity during these years of the woman. The developing woman.

A All right. By the time the average human reaches the 18th year, both male and female, do you have [58] an opinion, as to whether or not there is any difference in emotional maturity between the sexes?

A My own clinical — and this is based upon my regular work with young people.

I find no essential difference in their maturational levels from the point of view of their emotional or psychic development. Both of them have a lot of work to do for the rest of their lives.

JUDGE HOLLOWAY: Emotional or what?

A Emotional or psychological development.

BY MR. GILBERT:

A Doctor, are you aware of any scientific or experimental evidence or do you have an opinion regarding the ability, respective[12] ability, of males and females with special emphasis on the 18 to 20 years of age bracket, in their respective abilities to handle alcohol in the normal social context or in the normal context?

A Now, are you referring to the ability to — well, I guess we have already dealth with that, not — are you talking about alcohol using behavior?

Q Right. From the behavioral aspects.

A I see. My impression is that males seem to have

[12]"Respect of" appears in the original.

a greater interest in experimenting with alcohol, or that somehow the use of alcohol, alcohol using behavior seems to be associated with the idea of being a man. So, we see some, [59] you know, experimental interest in some alcohol using behavior that certainly is associated with that. Is that the response to your question?

Q Well, I was thinking more in a biological sense. Can you think of any difference in the male and females' biological ability to handle alcohol?

A Well, now, only one thing occurs to me, and that is that very simply put, women are, on the average, smaller than men and very specifically their volume of body water is less than a man. So, given a fixed dosage of alcohol, a woman will regularly obtain a slightly higher blood level of alcohol than a man would.

Q To your knowledge, Doctor, is that difference which, is that difference enough to be immediately or clinically significant?

A I would say perhaps it is, and we have some slight evidence to that effect in a study that is recently done by Dr. Ben Jones, here at Oklahoma City, in our Center for Alcohol Related Studies.

Q Is that the Dr. Ben Jones who is present here in the courtroom today?

A Yes, And this is titled "Sex Difference in Response to Alcohol" where memory functioning in both men and women have been studied systematically.

Q All right. Now, Doctor, he will be available to [60] testify next. Since it does tie into your testimony, could you just summarize what the findings were, however —

MR. MOORE: I object, Your Honor.

MR. GILBERT: Let me rephrase the question.

JUDGE HOLLOWAY: Very well.

BY MR. GILBERT:

Q Are you familiar with his study and his findings?

A Yes.

Q And do those, do you have a, are those findings consistent with what you understand about the relationship between the nervous system and ethyl alcohol and whatever sexual differences there may be?

A Yes, very much so.

Q All right. Would you summarize then, what those findings were.

MR. MOORE: I renew the objection, Your Honor, I don't feel that Dr. Ruffin is competent to testify from another doctor's report. Especially since that gentleman is present in this courtroom and available to testify.

JUDGE HOLLOWAY: Objection is sustained. You may answer the question as to his own opinion, from his own studies, but to refer briefly or merely to the other doctor's opinion would not be competent.

BY MR. GILBERT:

[61] Q All right. I was just doing it for the sole purpose of linking it up.

JUDGE HOLLOWAY: You can ask him what his opinion is and then ask him if it is the same.

BY MR. GILBERT:

Q All right.

Well, doctor, is your opinion about the respective abilities of young adults to handle alcohol the same as or would they be consistent with Dr. Jones' conclusions?

A Yes. And something I was particularly pleased by was Dr. Jones' incidental observation that perhaps women have even a greater tendency —

MR. MOORE: I object, Your Honor. Let Dr. Jones testify to this.

JUDGE HOLLOWAY: I believe that the objection is well taken in line with the Court's ruling and the

other physician can testify.

MR. GILBERT: Very well.

JUDGE HOLLOWAY: Dr. Ruffin may testify as to his own opinion as to this point you are developing, if you wish, but not merely as to what the other physician —

MR. GILBERT: Yes.

Q Dr. Ruffin, you have heard the order of the Court. If you have something of your own to say, you may say it.

[62] A Yes. Now, I am responding to a finding of Dr. Jones' study, right?

JUDGE HOLLOWAY: Well, you may state your opinion, Doctor, on the question being asked. We are pleased to receive it. Your own opinion.

A Fine. That women tend to become intoxicated, seems to me, a little more readily than males do on the same fixed dosage of alcohol, but also they have an increasing tendency towards intoxication or some type of emotional difficulty that would appear to be a kind of impairment in their premenstrual period.

I have had this clinical impression for a long time. It is quite interesting to me to see it corroborated in the experimental situation.

Q All right, Doctor. You are aware that this is a lawsuit to determine the legality of a statute which allows females to purchase 3.2 percent alcohol at age 18 while males are prohibited thereform until age 21. You are familiar with that, are you not?

A Yes.

Q All right, Doctor. Drawing upon your own expertise, do you have an opinion, based upon either chemistry or biology or neurology or medicine or psychology or psychiatry, as to whether or not this discrimination is rational?

[63] A Specifically, the 18 to 21 years discrimination?

Q Yes, that is right.

A I find no rational basis for such a discrimination.

Q Thank you very much.

You may cross examine.

CROSS EXAMINATION

BY MR. MOORE:

Q Dr. Ruffin, let's just start at the last there. You see no rational basis for the classification, none whatsoever?

A For the classification?

Q Of the state law that we are talking about today.

A Oh, yes.

Q You see absolutely no basis for that classification?

A For that specific classification, no, sir, I do not.

Q Are you talking about now, solely within the terms of biological chemical standpoint or any type of justification? In other words, is your testimony going outside the scope of your expertise or are you just saying that within your area of expertise there is no rational justification? I want to be very clear on that. Am I clear?

[64] A No, I am not understanding your question.

Q Well, it is a very important statement you made, Dr. Ruffin. You said that there was no rational justification for the state law which we are talking about.

A For this discrimination or ages between 18 and 21?

Q That is right.

Can you say there is absolutely no rational justification or is there just merely no rational justification from biological, sociological or psychiatric standpoint?

A I would say none from a biological, sociological

or psychiatric standpoint, yes.

Q Thank you.

Now, I am sorry, you said, but I don't recall, how long have you been a practicing psychiatrist?

A Since 1965.

Q About nine years?

A Yes.

Q Do you specialize in the treatment of alcoholics? Do I gather that from your testimony?

A Actually, I do a great deal of work with alcoholics, yes.

Q How many patients have you had, male, female, in this age group which we are talking about, 18 through 21? [65] Generally, I don't certainly require a precise number.

A You mean people who would be defined as alcoholics?

Q Patients, people who have come under your observation, hundreds, thousands, ten —

A Well, I would say several hundred.

Q And how many of those several hundred have been alcoholics, male and female? Could you generalize?

A I would say what you and I and probably all members of this Court regularly define as alcoholism is seldom defined in this group of people, seldom defined. We see alcohol use, but not someone labeled as alcoholics. I am not saying it doesn't exist. I am saying you seldom find it.

Q What is your definition of an alcoholic then? The chronic problem drinker?

A That is certainly the ultimate statement of alcoholism.

Q Habitual user?

A Yes, and also compulsive use. You know, inability

to take a drink and stop. That is certainly a very fine definition.

Q Have you seen any chronic compulsive drinkers in this age group, 18 through 21, male or female?

A Perhaps I have seen someone, 20, 21, I think I [66] have seen a few young males like that, yes. Most of what I see in this age group is the use of other chemicals, other than alcohol, other drugs.

Q I see. So, you have seen some males 21 and 22 or within your definition, alcoholics, but no females. Is that correct? Am I accurately summarizing your testimony?

A Offhand, I can think of two young women who were alcohol abusers too. I have seen more males than females.

Q More males than females?

A Oh, yes, yes.

Q Now, obviously, then, most of the alcoholics or problem drinkers, which you treat, are older in age then. Is that correct?

A Most of those would eventually come into treatment, yes.

Q Now, in the course of your therapy with these people, could you generalize as to what time they started drinking?

A Oh, it is amazing. I am surprised at how often many of these people will tell, beginning to drink at 9, 10, 11, 12.

Q 18, 19, 20, 21?

A Usually earlier, usually earlier.

Q Is there any variation that you could state with [67] regard to males and females when they start drinking? Would there be any age variation there, generally speaking?

A Well —

Q If the question is too general, feel free to tell me.

A No, let me think about it for a minute.

My impression would be that a woman might start drinking later.

Q Okay. Now, during your direct testimony — well, let me recap for a moment.

Your testimony was that as a general statement, women start drinking later than men. Is that correct? And that is based upon your experience with alcoholics that you have treated in later life and you go back and question them as to when they started. Is that a correct brief summary of what you have said?

A Yes. I am sure the question has been more systematically studied.

Q But — well, isn't one of the problems in this area, and correct me if I am wrong, but isn't one of the problems in this area is that there have been a lot of studies conducted and statistics in the area of alcoholism as a function of age and sex. Is that an accurate statement?

A It is certainly what I have found, yes.

[68] Q So, we —

JUDGE HOLLOWAY: Pardon me, but do you mean yes, there have not been many studies done on it?

A Yes, there have not been many studies. That is very evident in this book. There are a lot of references to sex related differences, that is through 1970.

BY MR. MOORE:

Q I am sorry. I didn't hear the statement you made to the Court there.

There are, are there not, a lot of studies in the book?

A No, there are very few studies in the book, studies of orangutans and chimps and rats and mice.

Q So, we are dealing with limited data. Is that right?

A That is right.

Q Okay. In the course of your direct testimony, you referred to the idea that women mature faster than men. Men mature faster than women. Now, were you speaking of that in a lay sense or — let me ask you this. Is there a credible theory within your position that men mature slower than women?

A None whatsoever.

Q There is no such credible doctrine, even though you don't agree with it?

[69] A Now, wait a minute, let me be specific now. There is no disagreement with the generalization that women mature, physically, you know, sooner than you do.

A That is what you call the primary?

A Secondary characteristics.

A I am sorry, secondary.

A Now, as far as the psychic or emotional development, I would say essentially no difference and here, of course, we are getting into, you know, a nice argument about what constitutes psychic or emotional maturation.

Q You said essentially no difference. Is there any difference?

A None that I could find in my own work.

Q So, it is your opinion that there is no difference in a psychiatric point of view between the maturity levels of men and women?

A Yes.

Q Is there a credible psychiatric school of thought to the contrary?

A No. I would say that psychiatric schools of thought, these days, with reference to the issue of maturity —

Q Yes.

A — are achieving a remarkable degree of consistency, [70] which is unusual in psychiatric work, I may add. And here, if you wish, I can cite, you know, two references.

Q No, I think you have made your point.

A You see, simply that the maturation or the maturation process is essentially a lifetime task, you know, proceeds continually through life. Through marriage, through growth of children and on through death, and as a matter of fact, how we handle death is an expression of our degree of maturity.

Q So, professionally speaking, I am talking about your profession — there is no credible school of thought which supports the proposition that men mature slower, is that correct?

A Right.

Q Is there, have you heard lay people express this opinion?

A Yes, it is a common myth, it is a common myth.

Q Do you think it, if those lay people might include legislatures —

MR. GILBERT: I object. That is getting opinions out of the doctor's field of expertise.

JUDGE HOLLOWAY: The objection is sustained. We believe the question is argumentative.

BY MR. MOORE:

Q Well, let me get to this lay opinion, if you will. [71] You were talking about maturity. I guess in a practical sense, in terms of the nesting characteristic of women or a woman during this age period. A woman shows more compensity to settle down.

A Yes.

Q That is what most people think?

A Uh-huh.

Q And that is what they refer to when they talk about different levels of maturity, is that correct?

A That is correct, that and the greater tendency toward quietness and less rambunctiousness.

Q Do you agree with that?

A Do I agree with what?

Q That women show a nesting instinct or settling down instinct or whatever you want to call it?

A I think women are quieter people. They are less active and that is readily demonstrated beginning in the early years of development.

Q So, I am not a psychiatrist, but if I were to say that maturity to me means settling down, let's assume that, then it would be accurate to say that men mature later than women. Is that correct?

A Well, by your definition.

Q You were present in the courtroom during the statistical data which I went through, which showed the [72] various arrest levels, were you not?

A Yes, uh-huh.

Q Without showing you those in detail, they show that males are arrested a lot more than females.

A Uh-huh.

Q For operating an open saloon, possession of liquor, public drunk, all types of offenses. Why is that? Do you have any professional opinion as to that?

Do you have any professional explanation for the statistics which I have offered today or any comment on them?

A Oh, I have some comments on them, yes.

Q Well, I would welcome them.

A Okay. Let's see, let me just — no, the two that you presented to the Court initially, your two first exhibits.

Let's see, I have seen neither of these previously.

The first is that a copy of the report presented by Mr. Wallock.

Q Yes, sir.

A Now, here I am just, you know, roughly, eyeballing —

Q Well, I don't want you to — it is not necessary to examine the statistics in detail.

A Well, I am talking about a rough eyeballing.

Q Can you account for that difference from a [73] professional point of view, from the psychiatric point of view?

A Oh, I see it is just normal, you know, this is how, this is how boys and girls are in our society where alcohol is available.

Q Boys drink more than girls?

A I don't know that. They may. All right, secondly, somehow they come to the attention of the law more readily, however that —

Q So, there is two possibilities.

A Right.

Q It is possible that boys drink more than girls and it is possible that boys are under the scrutiny of the law enforcement authorities more than girls?

A Uh-huh. Well, what I am impressed with is that the male, female differential, not boy and girl differential.

Q Now, let me ask you another question in winding up here.

You testified, there may be some overlap here, but you testified to the behavioral aspects of alcohol?

A Uh-huh.

Q And you said that the male shows a greater propensity to experiment. Could you elaborate on that. Are you saying that a male might be more inclined to experiment with alcohol than a female in ages of 18 through 21?

[74] A That seems to be so. We study, you know, a pure group of males, that —

Q What do you attribute this innate curiosity or experiment — Is there any known explanation for it?

A Well, none except the proclivity that is, again, how should I say, immensely normal during adolescence and particularly in connection with the issue of one's peer group.

Q Is it true that males are more aggressive than females?

A I don't think there is any question that males are much more active and much more, what you would call aggressive.

Q In all aspects of their human conduct, whether it be business, fighting, driving, drinking?

A Well, I can't say in all aspects, but I think very prominently so, and very generally so.

Q So, if an 18-year-old female had about three beers and an 18-year-old male has about three beers and they both slipped behind the wheel of separate cars, it is not inconsistent to think that the male would be more aggressive?

A Well, there is several considerations there. First, the problem in management of aggression is usually associated with whatever other kinds of emotional conflicts [75] exist within the individual at that moment.

In other words, I can be a very aggressive person. Okay, I am of a high activity behavior, but to behave impulsively and get out of control, you see, that is the point of discrimination right there, where things get out of control. We no longer — that is another matter, you see.

Q Well, perhaps that is what I should have talked about then.

A Okay.

Q Would the males be more impulsive?

A Not necessarily. You see, here, we all carry a lot of emotional conflict within us that differs considerably at different points in time and circumstance.

Now, when a person takes in alcohol and is in the state of considerable emotional tension, the probability of losing control is much greater. I don't think that males are uniquely afflicted in this respect.

Q Well, I am not a psychiatrist, Doctor, and I am having a little difficulty. I am just a lay person. You made the statement initially that males were more aggressive than females.

Now, how does that tie into your statement which you have just made there, of, can you define what we are talking about, aggression?

[76] A Okay.

Q As it would relate to drinking, if at all?

A Well, I tell you in my own notes, I do not prefer to use the word "aggression." I prefer rather to talk about activity or drive behavior.

Q I beg your pardon?

A Activity or drive behavior, because if we can contrast males and females — let's go to the playground situation. Looking at children in kindergarten or shortly after kindergarten, we see different, definite differences in the play characteristics of males and females.

Q Well —

A Now the males are labeled as being more aggressive. The males are labeled to be more aggressive. They're rougher, more body contact, more action within any particular space.

Q And this continues throughout their lives?

A Yes, sir.

Q Through the years 18 through 21?

A Uh-huh. Males have more muscles to put to work and they put them to work.

Q Is this an environmental function of one's character? Is it innate?

A I think it is basically biological. Dr. Carlotti, University of Wisconsin, in the Institute for Primate Studies, [77] has made the same observations with Rhesus monkies, just observing their normal development.

Q So, this characteristic is not derived from one's environment or culture. It is innate?

A For the most part, I think a certain amount can be taught, but I think most of it is essentially biological.

Q And that is this aggressive attitude or increased activity or however you want to characterize it?

A Greater activity behavior.

Q And it continues throughout the life of the male?

A Throughout the lives, I think it has a tendency to slow down, perhaps in the fifth decade.

Q Excuse me?

A I think it would tend to slow down in the fifth decade.

Q Would it be more acute if at all during the ages of 18 through 21?

A No.

Q When does this aggression or when does it rise and when does it fall?

A Oh, dear, that would be a curve of my own creation.

Q Well, I welcome your opinion.

[78] A Okay.

Q Would it be on the upslope or the downslope during the age 18 through 21? That is obviously what I am interested in.

A Yes. Well, in the first place, I see it as being more in a level phase, with the greatest period of activity being in earlier childhood, activity differential

between male and female being in earlier childhood.

Q So, we have got the curve rising and it is leveling?

A Yes, I kind of see it leveling out at 13, 14, 15, maybe.

Q Would it be at its high point — would it ever go any higher in subsequent years, generally speaking? I realize that there are —

A I don't believe so, no, sir.

Q That is all I have, thank you very much.

REDIRECT EXAMINATION

BY MR. GILBERT:

Q Dr. Ruffin, I believe there was opposing counsel, asked you if you were aware of a lay opinion that males mature later than females. You said you were familiar that there was such a lay opinion.

A Oh, yes.

Q Doctor, have you ever heard or do you know, is [79] there a lay opinion that Negroes are inferior to Caucasians?

MR. MOORE: I object, Your Honor. That has no relevancy to the issues in this case.

JUDGE HOLLOWAY: Objection sustained.

MR. GILBERT: Your Honor, I would propose that the relevancy would — well, very well.

JUDGE HOLLOWAY: I think that is far afield of what our inquiry is today. We are all agreed.

BY MR. GILBERT:

Q Doctor, are you familiar whether or not there is a lay opinion that some racial groups have a greater alcohol problem than other racial groups?

MR. MOORE: Your Honor, I object. I have heard this line of argument. We are not dealing with classifications based upon race. If we were, I would concede

error. I assure you I object to the question.

JUDGE HOLLOWAY: Objection is sustained.

MR. GILBERT: All right.

Q Now, Doctor, I heard on cross examination some talk about aggressiveness. Opposing counsel was, I believe, was trying to get you to answer that males were more aggressive than females and I believe you answered that they were more active than females.

A I prefer that as my point of departure, yes.

Q I am sorry?

[80] A I prefer that as my point of departure, yes.

Q All right. Let me ask you this. Assuming that the word "aggressiveness" or activity, whatever we want to call it, has some meaning, is this a characteristic which is exhibited by 100 percent of all males?

A We are talking about aggressiveness as it becomes impulsiveness and hostility.

Q Well, let's say aggressiveness to an extent of being a social problem?

A No, it wouldn't be.

Q Could you give an estimate, based upon your experience or knowledge or opinion as to what percentage of males have an aggressiveness problem, let's call it?

A Well, you know, two perspectives. First there is the clinical perspective and here I only know what comes to my attention. But among the people who I see in the clinical situation, we can say there is a considerable problem with aggressiveness and its management. Although most of it even under those circumstances, are pretty well disciplined. If I were a consultant, say, to McAlester,[13] which I am not, I would see a much greater problem to consider.

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[13]The site of the Oklahoma State Penitentiary.

As I look up and down the street, and consider the world I live in, outside of the office, it seems to me that the vast, vast, vast majority of males do a very decent [81] job of managing their excessive, what might be, their tendency toward excessive, aggressive behavior, if you like, hostile behavior. Do a very nice job of that.

Q Could you give us any kind of percentage estimate as to taking the population as a whole?

What percentage of the male population has an aggressiveness problem?

A That would be the range, I say, of guesses, but I would be thinking in terms of less than 5 percent or less than 3 percent.

Q Now, do females ever display an aggressiveness problem?

A Oh, yes, yes.

Q Could you give us an estimate as to what percentage a female might display in aggressiveness problems?

A I put it in the same percentage range, but here we are talking about such a tiny percentage. It, I think what I am struggling with here is again, I am a peculiar sample of my own clinical experience. I have recently, in the last couple of years, seen an extraordinary number of very hostile women and that is just a sample of my own clinical experience.

Q Could you give us an estimate of males and females having an aggressiveness problem within the 18 to 20 or 18 through 20 years old age category?

[82] A From my own clinical perspective, I really don't find any difference between them.

Q All right, let me ask this, Doctor. I am going to ask the question, if it has no meaning, just say so.

A Okay.

Q Could you give us an estimate, percentagewise, as to how much more aggressive the average male is beyond the average female?

MR. MOORE: Your Honor, I don't really — well, if he — the question is so speculative. I wish counsel would at least lay a little better predicate for it. It is just beyond me, perhaps he can help me.

A Well, of course, it is beyond me, too.

BY MR. GILBERT:

Q Well, do I understand that that question has no real meaning then?

A No, I can't respond to that.

Q Well, let's raise it with the terminology you want and use it and if it still doesn't have any meaning, say so. Could you give us an estimate of how, in percentagewise, how much more active the "average male" is over and above the "average female"?

A I am impressed with the leveling off, as I suggested before, of, you know, this more active behavior, [83] this need for activity as one moves later into adolescence, it seems to level off.

Q Okay. Now, let me ask a couple of other percentate questions, if you know.

With reference to — well, I will ask both the population as a whole and then with reference to the 18 to 21 years of age.

What percentage of males, and then females, have what you would call an alcohol problem to such an extent that they present some danger, if they have access to alcohol?

A I really don't know. I am impressed, though that, if I understand alcohol, and this I know largely through other people's work, in latent age, in both males and females, but I have no way of responding to a percentage question.

Q Let me ask you this. Would it, say, over 51 percent of it —

A No, no, we are talking about a very, very tiny percentage of the population. Again, I would say —

JUDGE HOLLOWAY: Just a minute, just a minute, Doctor.

Do you have an objection?

MR. MOORE: I am sorry, I don't like to object, but I must. He has indicated, I believe, that he is testifying [84] on the basis of other people's work. His own opinion is just fine. Based upon his clinical experience. I have absolutely no objection to that, but I do object to him giving opinions or any kind of evidence from the work of other people.

JUDGE HOLLOWAY: It is — all right, the question will be, the objection will be overruled. If the witness has his own opinion on the matter, he may answer the question.

BY MR. GILBERT:

Q Do you have an opinion?

JUDGE HOLLOWAY: Let him answer the question now.

The question has been put. Don't put another question and we will have another objection. You have got the question.

BY MR. GILBERT:

Q You have heard the question as it was read by the Reporter.

A Okay. My first estimate would be certainly less than 5 percent and I would think, we are talking about maybe one or two percent of the population.

Q Now, is there a different percentage, Doctor, for male and female?

A None that I can define.

Q All right. Okay, now, I just have one other

[85] question, Doctor.

I notice that, I meant to ask this on direct. Do you have some books or volumes present at the witness stand with you?

A Yes, I have them.

Q You identified the two-volume work.

You have another book there, would you identify that book.

A Oh, this was a study. This book here, this was a study done by the, under the auspices of Medical Research Council, which is a special agency of Government in England and it is the effect of small dosages of alcohol on a skill resembling driving. That is done in 1959.

It was done in, typically, the way the English do it, and there is one reference here to sex differences.

MR. MOORE: Excuse me, may I object at this point? I don't know that this is competent for testimony. However, the basis for my objection is, it is outside the scope of my cross examination. Even on a more practical grounds, this is material which I have never heard of and have not had a chance to examine. As counsel has had a chance to examine my material. So, I object on those three bases.

JUDGE HOLLOWAY: Well, the witness has already given a general statement without revealing any of the tenor [86] of the document. So, I don't think there is any grounds for an objection at this time. It will be overruled.

If we get an offer of the exhibit, or an offer of the substance of what it is, or what is in it, then you may object to it.

BY MR. GILBERT:

Q Dr. Ruffin, in those works that you have, could

you identify the pages of relevance to this sexual differentiation?

A Yes. Page 55 provides a summary statement.

Q Is that in the British work?

A Yes, sir, that is what I am talking about. And on Page 16 there is a reference of the alcohol doses that were administered in the experiment.

Q All right. Now, are, in the two-volume book that you referred to earlier, are there any pages of relevance that you feel —

A Nothing.

Q Your Honor, subject to objection and subject to withdrawing the exhibit later, since it is a library book, I would offer Page 55 of the British work that the witness has referred to.

MR. MOORE: Please note my objection on the same grounds that I have previously stated.

JUDGE HOLLOWAY: Let's get the objection on the [87] record because I am not clear on it.

The Court doesn't know just what you're objecting to. There has been an offer of Page 55 of this British work on alcohol studies.

MR. MOORE: May I see that.

Well, Your Honor, the basis of my objection was, it was certainly outside the scope of direct and cross examination and also we have a study from Britain which is several years ago, oh, over ten years, about fifteen years ago, and I was not provided a copy or given the reference to this book so that I could study, prior to coming here today, this morning, so that I could cover an intelligent cross examination. I object on those three grounds.

JUDGE HOLLOWAY: The objection is sustained. The Court feels that the objection questioning the denial of the right to cross examine the proponent of the

exhibit really raises the hearsay objection which is here good; and also that the witness is offering the testimony of another party and therefore the objection is sustained.

MR. GILBERT: Let me just ask one final question.

Q Doctor, is your opinion the same as reflected in the British study?

A Yes.

Q All right. I have no further redirect examination, Your Honor.

[88] BY JUDGE HOLLOWAY:

Q Dr. Ruffin, let me ask you one thing, please. Where I am confused, in your direct testimony, you related having seen several hundred cases of what the Court would recognize as alcoholic persons; is that correct, in your clinical studies?

A No, sir.

My response to several hundred was that in terms of, or a couple of hundred, at least, would be of young people. Wasn't that the question?

Q Of young people?

A Yes.

Q Very well. Did you make — I may have my notes in error. I thought you testified that there were more males than females in your opinion, from your clinical studies, that were in the group of alcohol users?

A Yes, yes, sir.

Q Is that true with reference to the 18 to 21 age group?

A It would be, really — Your Honor, it is true all the way through, beginning, 3, 4, 5 years of age, but I see many more men, or many more males than females.

A That have the difficulty that you —

A Some species of difficulty, some kind of difficulty that brings them to the attention of the — that

[89] is generally true in the psychiatric channels that we follow. In the guidance centers where we consult them, we see as many as — let's see, I think the preponderance of males over females would be anywhere from three or four up to seven to six, to seven to one and we are talking about children of all ages. So, this is normal statistically.

Q That three or four, up to six or seven to one as a radio of problem of males over females?

A Right.

Q With alcohol abuse?

A No, no, I am only talking about total referrals now.

Q Total referrals?

A Total referrals.

Q Well, I was referring to your testimony that I thought I understood that you saw more males than females having difficulty with alcohol abuse.

A Yes, sir. That is generally true. And again that is true all through life.

Q In the 18 to 21 and all age groups?

A 18 to 21 sample is a very small sample of the, tiny sample of the total use of people using alcohol.

Q Well, from your own clinical studies of your own patients, is that observation true that there are more male than female patients having difficulty with alcohol at [90] the ages of 18 to 21 in that small group?

A You can tell from how I am responding to this, I really can't say with confidence, yes. If so, it is not part of my experience, not with conviction, no, sir.

Q Very well, thank you.

Anything further of this witness?

MR. GILBERT: Your Honor, I think I have gotten confused on one point. If I could clarify it.

JUDGE HOLLOWAY: You may examine further.

REDIRECT EXAMINATION

BY MR. GILBERT:

Q Doctor, I believe you, pursuant to His Honor's question, you said you see about, well, considerably more males with alcohol problems than females.

A Overall, yes, sir.

Q Now, do I understand that you're saying that there are more men with alcohol problems or do you just see more men with alcohol problems?

A Well, if what I see, you know, is what I see, and I don't know about the validity of the sample, but, yes, I think it is. There is no question about it. It is generally accepted that males are much more grievious, much more serious alcohol abusers. But that is generally, that becomes evident in the 4th and 5th decades. Alcoholics are not usually defined as alcoholics, as problem drinkers, [91] until the 4th or 5th decade. Almost without exceptions, people I have seen in my office are in that group and yet I have practiced, at one time, I will be working with someone seven years old and someone seventy years old, but among alcohol abusers, defined as such, they are almost without exception, defined within the 4th and 5th decades.

Q Well, do I understand from that —

A Between thirty and fifty years of age.

Q That among males you have fewer alcohol problems in the 18 through 20 age group than you do in later life?

A Yes. You just don't see them defined as alcohol problems.

Q I see. Very well, thank you.

JUDGE HOLLOWAY: Anything further of the witness?

MR. MOORE: No, Your Honor.

JUDGE HOLLOWAY: May he be excused?

Just a minute.

BY JUDGE DAUGHERTY:

Q You're a biologist, are you?

A Well, sir, as much as a physician is — yes.

Q Well, what is the science of biology?

Q Particularly —

Q As it relates to this case.

A Sir?

Q As it relates to this case. Where we are talking [92] about men and women. Can you just tell me generally what is explained within biology?

A Well, biology is the study of living systems.

Q All right.

A Living systems, yes.

Q All right. And there is a difference in the living system of a man and a woman, I take it?

A Some differences, yes, sir.

Q Now, is there any difference between the two when it comes to them consuming beer, with particular reference to the 18 to 21 year bracket?

A The only difference that I would see — well, it is — let's just start it from, a strictly biological dimension to a social dimension —

Q Why don't you just keep it on a biological basis?

A All right. To stay within the biological dimension, we see that women have less body water in which a specific dose of beer might be diluted, so they would tend to have a higher blood level of alcohol in response to a specific dose. That is one thing.

Then, we have a different thing. This is, you know, this is a well-established difference. A difference then in so-called fluid compartments of males and females.

Secondly, there are these — let me say one other [93] thing. It appears there is no difference in the rates

at which alcohol is metabolized to males and females. The efficiency[14] of metabolism is the same. All right.

Now, I do think that there are some so-called interactional defects between the, I will put it this way, there is some kind of interactional effects between alcohol and the physiological state that exists in the premenstrual woman.

I think these are beginning to be defined.

Now, those would be my responses to strictly biological questions.

Q Is there any biological reason why a female should be exposed to beer at 18 and a male not exposed to beer until 21?

A No, sir, none that I can define.

Q Do you have any explanation as to why statistics show[15] that males have more alcoholic criminal arrests than women?

A Overall?

Q Yes, during this age.

A Well —

Q Has it got any biological reason?

A What things are happening, first, let me say, I am not impressed that these statistics show that. That is my own personal response to their cursory review.

[94] Now, talking about overall criminal review —

Q No, I didn't talk about overall. I am limiting it to the drinking offenses.

Now, is there any reason why, when you take one of these age brackets and compare men and women that you have 10 times as many men having a drinking criminal result than you have for a woman. I want to know if there is any biological reason for it?

A I know of no biological reason.

[14]"Deficiency" appears in the original.

[15]"Know" appears in the original.

Q Do you have any idea what the reason is?

A I think it more socially determined and I think it is socially determined right on through life. I don't really think it is peculiar to this period and at least at, as I scrutinize these statistics, it is a consistent finding through life.

In other words, that males do tend to use alcohol more readily and more readily to the point of it being identifiable abuse. But, not just in the 18 to 21 year period.

Now, there is no question about the difficulties, the disparities, it runs 10 to 1. A very consistent thing here.

Q Well, do you see any rational basis then why the legislature should say, men, you can't get beer until you're 21; women, you can get it at 18.

[95] A No, sir, I find no rational basis for that.

Q You think both of them should get it at the same age?

A Yes.

Q Okay.

BY JUDGE HOLLOWAY:

Q Psychologically, would your answers be the same in the difference between men and women?

Judge Daugherty has been speaking biologically.

A Yes, yes, I understand what you mean.

As a public health practitioner, a person with that kind of orientation, also as a citizen who is not interested in being killed prematurely by a misbehaving alcohol abusing driver, I would love to see alcohol totally excluded and I suppose if we are going to discriminate, we would totally exclude it from males and if we are going to discriminate within women we would totally exclude it from women within the last one-fourth of their menstrual cycle.

JUDGE DAUGHERTY: We tried that and it didn't seem to work.

A I know.

JUDGE DAUGHERTY: So, why don't you answer the Judge's question about whether there is a psychological difference.

[96] A Sir, I misunderstood you.

Didn't I answer it?

JUDGE HOLLOWAY: No, I don't think you did. You got off on the prohibition talk which I didn't think was relevant to the question.

A But, I am saying, if we are talking about using psychological differences, I am talking about the interaction between, you know, this activity factor which is characteristic, you know, characteristics normal in males and also what is, you know, a culture characteristic of our society, when males learn to use alcohol. We don't see this in other societies. We don't see this kind of alcohol abusing behavior.

Apparently in the Israeli or Italian —

Q Dr. Ruffin, what I meant to ask you simply, was this in line with Judge Daugherty's questions, psychologically, do you see a rational basis for a difference such as in this statute permitting the women at the age of 18 to have beer and men not until 21? Psychologically, is there a rational basis for it?

A No, sir, I see no basis for it whatsoever.

BY JUDGE DAUGHERTY:

Q What about the fact that men are more active and more, have more accidents, more driving alcohol oriented accidents? Is that psychological?

[97] A In the broadest sense, yes, sir.

Q Why isn't there some rationale then to keep beer away from people who are going to be more active by drinking it and have more drinking offenses, both

driving and otherwise?

A Well, I did respond to that question, I thought, when Judge Holloway spoke to me previously. That became a lecture on prohibition.

Q Well, if you take an 18-year-old man and and 18-year-old woman and you give them both some beer and the man is going to be more active with it, and he is going to have more drinking offenses with it, isnt' there some rationale in saying, let's just wait about three years before you get it, maybe things will even up then?

A Yes, sir, but in the interest of public health, I would like to see it wait some more.

Q But that is up to the Legislature. They have decided this 18 to 21 bit. It has been attacked as having absolutely no rationale whatsoever.

A Well, it, all right, it is a bit of legislation in the interest of controlling a tiny part of the problem. You know, I can see that.

Q Does it have the effect of controlling a tiny part of the problem?

A I really don't know how effective it is. I don't

[98] know that.

Q Well, does it have a tendency to have an effect?

A Hopefully it would. I don't know though.

Q All right.

JUDGE HOLLOWAY: Anything further of Dr. Ruffin?

MR. MOORE: No, Your Honor.

JUDGE HOLLOWAY: May he be excused?

MR. MOORE: Yes, Your Honor, he may.

JUDGE HOLLOWAY: Thank you, Dr. Ruffin, you may be excused.

MR. MOORE: Your Honor, may I impose on the Court for a three-minute recess?

JUDGE HOLLOWAY: We are going to consider that problem right now, if you will wait just a minute, Mr. Moore.

How long approximately do you think the testimony from the next witness may be?

MR. GILBERT: Your Honor, I don't think his testimony, unless he expresses a disagreement, would be more than 10 minutes.

JUDGE HOLLOWAY: Your direct examination?

MR. GILBERT: Yes, sir.

JUDGE HOLLOWAY: We will be in recess for ten minutes.

(Thereupon, a brief recess was had pursuant to [99] which the following proceedings were had in open court with all appearances the same as before the recess.)

JUDGE HOLLOWAY: Call your next witness.

MR. GILBERT: Your Honor, the Plaintiffs would next call Mr. Ben Jones.

JUDGE HOLLOWAY: Very well.

DR. BEN JONES,

having first been duly sworn upon his oath, took the witness stand and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. GILBERT:

Q Would you state your name and address, please sir.

A Ben Jones, 7414 Lyrewood Lane.

Q What is your business or trade or profession?

A I am a research psychologist.

Q And by whom are you employed?

A University of Oklahoma, Health Science Center.

Q All right. Is that a part of the University of Oklahoma Medical School?

A Yes, sir, it is.

Q All right. What do you actually do there, sir?

A I am a, I am Assistant Professor of Psychology, Department of Psychiatry there, and I am at the Center for [100] Alcohol Related Studies on 15th and Lincoln, which is a division of the Department of Psychiatry.

JUDGE EUBANKS: Speak louder, please.

A All right, I am sorry.

I am Assistant Professor in the Department of Psychiatry at the Medical Center and carry on research for the Center of Alcohol Related Studies at 15th and North Lincoln, which is within the Department of Psychiatry and research projects on, going on there, that are concerned with mainly the behavioral effects of alcohol on humans.

BY MR. GILBERT:

Q Would you state to the Court your professional and academic degrees of qualifications.

A I have received a BS from Oklahoma State University in 1965. A Ph.D. from the University of Oklahoma in 1972.

Q What is your degrees?

A They're both in psychology.

Q All right. Is your Ph.D. in any particular area of psychology?

A Yes, it is called Biological Psychology.

Q All right. And are you the same Ben Jones whose study was referred to in this case?

Q Yes, sir, I am.

Q All right. May it please the Court, subject to [101] cross voir dire, I would ask to have this witness qualified as an expert, biological psychology.

JUDGE HOLLOWAY: Is there any examination you wish to make or do you have a statement about the qualifications of the witness, Mr. Moore?

MR. MOORE: No, Your Honor.

JUDGE HOLLOWAY: No objections?

MR. MOORE: No.

JUDGE HOLLOWAY: You admit the qualifications?

MR. MOORE: Yes, Your Honor, I do.

JUDGE HOLLOWAY: Very well.

BY MR. GILBERT:

Q Now, Dr. Jones, have you had an occasion to make a study of the effects of alcohol upon young adults of the male and female sexes?

A Yes, I have.

Q All right, now, was this study the same study that the previous witness was referring to?

A Yes, sir, it is.

Q All right, Dr. Jones, in your own language, would you please just summarize or explain to the Court what your study was and what conclusions were drawn from it. What the experimental evidence was and what happened and what the, what you found out about the sexual differentiation on the handling of alcohol to be?

[102] A Briefly, in background, was involved when we, we had been testing mainly male subjects in our Center for Alcohol Related Studies and this is the traditional and most drug researched.

We did have occasions, several times, to test females, female subjects, and discover that on the dose, calculated on pound per body weight, that the females get very ill and could not finish the study and that became very interesting to us because it appeared as though the women were not able to drink as much alcohol as the men.

So, we decided for them to take a formal[16] study

[16]"Form and" appears in the original.

to determine that this was general to the population we were working at.

So, essentially, what we did, we tested 20 females and 10 males. We administered .3 milliliters beer, part of 190 proof, USP, ethanol, and mixed it with the body weight and mixed it with the orange drink to something like a screwdriver and asked them to drink this and monitored the blood alcohol level using a Stevens Model 900 Breath-O-Lyzer, which is a model used by the highway patrol in the State of Oklahoma.

We administered a behavioral test, because a verbal memory test —

Q Excuse me, Doctor, if you could speak a little slower, I think it might help.

[103] A Okay. We asked the, all the individuals to do the test, before we administered the alcohol, to determine there were no differences between the males and the females before they drank the alcohol.

After consuming the alcohol, we began testing them and found that on one aspect of memory test, the delayed memory part that the women actually performed a little worse than the males. Overall, everyone did worse under alcohol.

The other finding was that even though the subjects were administered the same dose of alcohol per pound body weight, the females reached a statistically significant higher blood alcohol level than the males did. And from our observations, the females on the whole became more intoxicated on a set amount of alcohol than males did.

We also asked the women to come in at two different times in their menstrual cycle, either Day 1 of the menstrual cycle or Day 14 of the menstrual cycle. The one who, the others came in Day 14 and Day 28 of their menstrual cycle and in general what we found

was that during the premenstrual period, which is about a week before the beginning of the menstrual flow, approximate Day 25 to Day 28, that the women that were tested in this time period achieved a much higher blood alcohol level than [104] the women that were tested at the other times during the menstrual cycle.

So, in general we came to several major conclusions. One, that when women are given the same amount of alcohol per pound of body weight that they will reach a higher peak blood level, blood alcohol level, than males will and that when women are tested during the premenstrual period, during the menstrual cycle, they will obtain a higher blood alcohol level than they will at other times.

And three, that on this particular memory test, that women were more affected than males with this dose of alcohol.

A Okay, Doctor. Let me just clear up a few things. You talked about equal amounts of alcohol per body weight. Does that mean that, say, both the male and female subjects took exactly the same amount of alcohol, or what does that mean?

A Okay. As Dr. Ruffin explained, alcohol is distributed throughout the body proportionate to the amount of water in the body and also according to the body weight. So, we would weigh the individual and then calculate how much alcohol to administer depending on how much that person weighed. So, if we tested a male and female and they both weighed 100 pounds, for instance, they would both get the [105] identical quantity of alcohol.

Now, let me mention, as Dr. Ruffin mentioned earlier, that the women have a lower proportion of water contained in their body, so when they drink the same amount of alcohol, it becomes more concentrated

and this is the reason we feel like it reaches a higher blood alcohol level on the same amount of alcohol.

Q Do I understand that actually in your study the women were taking less alcohol in an absolute amount?

A No, in our study, it just so happened that the males and females were equivalently — in other words, there were no difference in the total men body weight of the two groups.

Q Now, you say that males, or that the females showed some variation in the effect of intoxication regarding the period of the menstrual cycle in which they took the alcohol.

Was there any, was there any period of the menstrual cycle where the female showed equal or less intoxication than the male?

A According to our findings during the first part of the menstrual cycle, approximately Day 1 to Day 4, the peak blood alcohol levels were very similar to the males. They were not statistically different and as progressed through the menstrual cycle, the difference became [106] different, for instance, Day 14, they're a little higher than the males. By the time you get to Day 28, they're statiscially significantly higher than the males. That is the main point where they're higher than males. At no time did we find the reverse where the males were higher than the females.

Q So, the females were somewhat inferior at all points of the month?

A I would not say inferior. I would say they reached a higher blood alcohol level.

Q All right. Did I understand that your finding of a higher blood alcohol, translated into ability to perform certain mental tasks, or lack of ability to perform certain tests?

A Yes, that is correct.

Q Could you explain to the Court what the psychological task or mental test was that you administered.

A This is in psychological terms, it is called a free recall memory task.

It is actually a very simple task where words are put on slides and then the slides are projected onto a screen and the slides come on one at a time at about two-second intervals and each time the slide comes on the screen, the person says a word out loud and in this case the person saw 12 words. As soon as the 12th word went over [107] the screen, at that point the subject was asked to write down as many of these 12 words as he or she could remember. This is called an Immediate Memory Task.

Each subject saw six of these lists of 12 words. By the way, these are common, everyday nouns and they're very simple. Most people all know them. So, that the individual wrote down the words after the, each list, and then after six lists he wrote down all the 72 words he had just seen. This is called our Delayed Memory Task.

As I mentioned, this is done before alcohol and also after alcohol. And the difference between the males and the females showed up on the Delayed Memory Task. Not on the Immediate Memory Task.

Q What was the difference?

What difference did you note?

A The females could remember fewer words than the males could on the Delayed Memory Task.

Q Now, Doctor, could you tell the Court about what age group you were experimenting with?

A We normally test college people, and usually their age ranges from approximately 21 to 30 years of age. At the present time, we are not testing anyone

younger than 21 because the problem we might possibly get into with the lawfulness of administering alcohol to underage subjects.

[108] Q Doctor, I note you have a document in front of you. Can you identify what that is?

A This is a research, or the, it is entitled "Sex Difference in Response to Alcohol".

Q And what is that? That the reports of the study you have just described?

A Yes, it is.

Q All right. Does that report contain the statistical tabulations and the specific data of the report?

A Yes, it does.

Q All right. May it please the Court, at this time, I would move to offer into evidence copies of the report which the witness has identified as being a report of his study, which he has just described.

JUDGE HOLLOWAY: Well, you will need to offer the exhibit itself and then you can furnish copies to us.

MR. GILBERT: Okay, fine.

JUDGE HOLLOWAY: I mean, you can mark any one of them you wish.

BY MR. GILBERT:

Q Doctor, I will hand you what the Clerk will mark as Plaintiffs' Exhibit No. 1 and two copies thereof.

THE CLERK: Judge Holloway, he had introduced another one a moment ago, a number was not given to it, but [109] do you want me to give it this one?

JUDGE HOLLOWAY: 2, I believe.

Very well, you may make your offer.

BY MR. GILBERT:

Q Doctor, I will hand you what has been marked as Plaintiffs' Exhibit No. 2 and ask you if you can identify that that document is.

A This is a research report that I wrote entitled

"Sex Differences in Response to Alcohol."

Q And this the report we have been discussing?

A Yes, it is.

Q All right. Did you, yourself, write the report, Doctor?

A Yes, I did.

Q All right. I would now offer Plaintiffs' Exhibit No. 2 into evidence, Your Honor.

JUDGE HOLLOWAY: Any objections?

MR. MOORE: Yes, Your Honor. The Defendants would object to the exhibit offer on the grounds it is incompetent and immaterial.

The Court will notice that we had absolutely no objection to the testimony offered by the defendant during the direct examination. However, at the end of the direct examination the defendant specifically stated that his sample was people 21 years of age and older.

[110] JUDGE EUBANKS: You use the word "defendant" when you mean witness?

MR. MOORE: I am sorry, I beg your pardon, yes. The witness testified that the sample, the people who he tested were 21 years of age and older.

Furthermore, the size of his sample was 30 people.

Furthermore, I have not seen a copy of this report before this morning and we would object to this being admissed into evidence on these three grounds.

JUDGE HOLLOWAY: The objection will be overruled. The Court will allow counsel a few minutes between direct examination and cross examination in order to examine the report, because it is subject to a hearsay type objection which is about what you're making, and you can have an opportunity to examine the report and then question the witness about it.

MR. MOORE: Thank you.

BY MR. GILBERT:

Q Doctor, based upon your conclusions, can you think of any biological, or, in your special discipline, biological-psychological reason, why, among young adults, one sex should be allowed access to 3.2 percent beer at an earlier age than the other sex?

Let me rephrase that.

[111] In particular, can you think of any bio-psychological reasons why any female should be allowed access to 3.2 percent beer at an age in advance of young adults of the other sex?

A About my only response would be that I don't know of any research that would support this.

I would like to comment also, that when we talk about 3.2 percent beer, we are talking about alcohol. Just like when we are talking about 90 proof vodka, we are still talking about alcohol. So, from our perspective in research, alcohol is alcohol and these are both ethyl alcohols and so from my perspective there is no reason at all that one would grant the right to drink one type of beverage at one age and not the other beverage.

Q All right. I have no further direct examination, Your Honor.

MR. MOORE: Your Honor, let me introduce James Barnett, also from our office. He has been studying this report and in anticipation of the Court's ruling, admitting it with the Court's permission, may he cross examine the witness?

JUDGE HOLLOWAY: Yes, that will be permitted.

MR. MOORE: Thank you.

Mr. BARNETT: Thank you, Your Honor.

JUDGE HOLLOWAY: Counsel, I am sorry, I didn't [112] get your name, please.

MR. BARNETT: Barnett, Your Honor, James Barnett.

JUDGE HOLLOWAY: Thank you.

CROSS EXAMINATION

BY MR. BARNETT:

Q Mr. Jones, if I understand your testimony correctly, these tests that you gave to your study group were in the nature of mental exams. Is that right?

A We refer to them as memory tests.

Q Yes. Did they involve physical actions on the part of the people involved?

A Physical in the sense that an individual had to, one, verbalize the stimulus that he saw or she saw on the screen and, two, he had to write it down using a pencil.

Q Well, as far as writing it down, did you find with the amount of alcohol you gave them, did you find any one of the tests, people unable to write the words out?

A Everyone was able to write properly.

Q So, they weren't physically impaired?

A The writing was not the type that you would see — the writing was not of the quality that one would see before someone drinks alcohol, but at the same time it was legible and could be properly scored.

Q These tests, they were not directed specifically [113] towards any type of liquor violation law, like there wasn't anything like driving a car involved in these tests?

A No, sir.

Q What, was there anything involved that you know of that is a part of any other liquor violation under the laws of the State of Oklahoma?

A Not that I know of.

Q Okay. I believe you also testified in your test, on the first page, it indicates that for immediate recall, the sexes came about the same on the tests. Is that correct?

A That is correct.

Q That means that they could immediately react to whatever came before their eyes?

A They could immediately write it down.

Q Yes. Would you be able to relate immediately, immediate recall as being any more relevant to, say, drunk driving than past recall after a period of time? In driving situations, would you have need of immediate recall as opposed to the other type?

A It would depend on the situation, for instance, when one is driving a certain route and he uses responses that he normally uses every day, then I would compare that to immediate recall. But, if something unusual came up out [114] of the, his peripheral vision, for instance, then the delayed action might be more semblance to the delayed recall.

Q So, in other words, in an accident type situation, the immediate recall would be more important?

A I don't know. There is no way of telling unless you know what the accident is.

Q Okay. On your sample, as I understand it, these are all college students?

A Yes, sir.

Q And they were all over 21?

A Yes, they were.

Q And they were 30 of these, 20 females and 10 males?

A That is correct.

Q From a scientific standpoint, would you say this is an accurate cross sample of young people in our society?

A I would merely say that it is a representative sample of college students here in Oklahoma City.

Q Who are above 21 years of age?

A Who were above 21 years of age.

Q And it would not reflect, as far as being, having any scientific validity on the age group of 18 to 21?

A Would you repeat that?

Q The scientific validity of this test, if any, would [115] not relate to the age group of 18 to 21?

A Unless there is some biological difference, which I don't know about, there is no reason why this should not apply to other age groups in order to determine that you would actually have to test these age groups.

Q So, it is possible that this test would come out differently for a different age group?

A Certainly.

Q These statistics that you, in your test, the males and females drank approximately the same amount of liquor. Do you have any — was there anything done in your test to indicate that outise of the test arena that males and females do drink the same amount of liquor?

A The ones that we tested?

Q No, just outside the test group; do males and females of the same age drink the same amount of liquor? Do you have any way of knowing that from your test?

A Well, what we do, when we test an individual we ask them about their drinking history and we equate subjects, so that we are dealing with people who are what we call light to moderate social drinkers. So, that in our study we don't use heavy drinkers at all.

Now, whether other people drink more outside the situation, I am sure they do, but we try not to test heavy drinkers.

[116] Q But, your test itself does not indicate whether or not the males or females, as a whole and the population, whether or not males and females drink approximately the same amount or less or more than any other sex.

A We are not asking that question, no.

Q So, you have no knowledge as to which sex drinks more?

A I have no experimental data on it.

Q All right. So, in the, to carry that a little further, you have no information as to whether or not one sex commits more liquor violations than another?

A I have no data on that.

Q Your test didn't go into that?

A No, it didn't.

Q No further questions, Your Honor.

JUDGE HOLLOWAY: I would like to ask you a question.

Q Doctor, did you yourself do the screening to select the tested students?

You mentioned you didn't use heavy drinkers. Did you do the interviewing or the screening to determine the 30 who would be in the group?

A I would have to say that, no, because we employed research assistants in our laboratory to usually schedule and [117] screen. Do the testing of the subjects.

Q All right. Are you aware of the results of their screening as opposed to one sex as to another? What I am getting at is, was it your result of your screening that there is any difference or not between those that are heavy users of alcohol, men, as opposed to women?

A Well, first, from what we can determine from merely questioning the people, that the men and women drink about the same amount of alcohol.

Now, I don't think this is true in the general population, where in general you might expect to find males consuming a greater quantity of alcohol than females.

However, that is one of the reasons we use college

people, because of generally, especially graduate students and medical students, which we also used, you don't find a heavy drinking problem, and so, in our studies we try to equate the drinking history to the different people that we use.

Q Do you have some redirect?

MR. GILBERT: No further interrogation, Your Honor.

JUDGE HOLLOWAY: Is there anything further from this witness?

JUDGE DAUGHERTY: I have a question or two.

[118] Q As I understand it now, from this test you took 20 females and 10 males, of same body weight?

A Correct, approximately the same body weight.

Q And you gave them the same amount of alcohol?

A Correct.

Q And then you tested their results?

A Yes, sir.

Q And do I understand that your result is that men got drunker than the women?

A Pardon?

Q That the women got drunker than the men?

A The experimental data indicate that the women achieved a higher blood alcohol level.

Now that has to be interpreted by what do you mean by drunkenness, for our purposes, we interpreted a higher blood alcohol level to be more intoxicated.

Q I thought that is what I said.

A Well, what I am referring to is, some people become very drunk at low blood alcohol levels and drunkenness if more of a matter of behavior. We are talking about just blood alcohol.

Q Well, what was the result of your test then? You say the females had a higher blood alcohol content?

A Yes, sir.

Q What does that mean?

[119] A That means that they drink the same amount as men to achieve a higher blood alcohol level. Now in general —

Q What does that mean in general?

A That means that there is a linear correlation between blood alcohol level and performance deficit, so the higher the person, the higher the blood alcohol level as for the individual, the greater impairment would demonstrate.

Q Well, then, women get drunker than men.

A Right.

Q Drinking the same amount of booze. Is that it?

A Okay.

Q Now, these people were 21 and above?

A Yes, sir.

Q Did you make any tests as to previous experience of these people to the use of alcohol?

A We have a somewhat detailed drinking history questionnaire that we had administered. This is somewhat difficult to get adequate information on, but merely we asked them when they did start drinking — by the way, most of these people started drinking, whether male or female, around 18. We asked when they started drinking regularly. We don't ask what they drink, because alcohol is alcohol and we are not interested in what type of beverage they drink.

[120] We ask them how much they have been drinking in the last week, last month and last year, to get an estimate of the general quantity. And we also usually ask the type of beverage they drink just for our own information.

Q Is it true, particularly when you're young, that the more experience you have had with drinking the better you can hold your booze?

A It is true of whatever age you are. The more drinking experience you have had, usually, you build up a tolerance for the alcohol. You adapt to it and you can do things better, the more you can drink.

Q Well, if you're in the age bracket and you have been drinking more than your freind, chances are that you can handle it better and not get as drunk as your friend. Is that right?

A That is possible.

Q Does this show up in blood alcohol counts?

A In general or in our studies?

Q No, let's say that you and I are the same weight and same age and I have been drinking quit a bit for about five years and you haven't touched a drop. We get the same amount of whisky. Now, is our blood alcohol content going to be the same?

A That is a very interesting question.

[121] Q What did these tests show?

A The research that I have made would indicate that you have a level, the same blood alcohol level in the same quantity of alcohol regardless of your drinking history. For instance, alcoholics reach the same peak blood alcohol level on a given amount of alcohol as a nonalcoholic would.

Q Well, then, the answer to my hypothetical to you would be that our blood alcohol would be the same?

A Correct.

Q Now, would I be better able than you to drive a car, to remember what I see, to do things physically?

A Certain things you would be able to. Things that you're used to doing.

Q I am using the driving the car and writing things down. I am using —

A Your memory would probably be impaired —

Q Would it be impaired more than yours?

A At the same alcohol blood level.

Q My drinking for five years and you not drinking any. Same size, but drinking the same amount of whisky?

A I haven't done studies in abstainers, so I don't know if you haven't had any alcohol —

Q Well, my hypothetical to you was an abstainer, but [122] is there any truth in the saying that we have all heard, that some people can handle their whisky a little better than others?

A Definitely, that is what tolerance is all about.

Q And is it true that one who has been drinking a little bit can handle it better than the one who, for the first time, starts drinking?

A I would say so, in general.

Q That leads to my question. What did you do in the way of comparing[17] previous drinking experience of women as compared to the previous drinking experience with the men?

A Well, I think I answered that. I will say it again. We had a detailed —

Q I am talking about what you did.

A What did I do?

Q Yes. Is that comparable? The man and the woman, have they been drinking the same amount of whisky for the same amount of years, so that they can either get the experience for the tolerance or whatever you want to call it, or drinking, or did you take the man that has been drinking for five years, put him against a woman who hasn't been drinking anything?

A Okay. As I mentioned, we tried to match our [123] subjects on how much they had been drinking. When they began to drink, to the best of our ability, and from quizzing them, they all were what we would call light to moderate social drinkers.

[17] "Impairing" appears in the original.

Now, I understand your question and I think it is very valid. If we did not measure properly, we would expect to see the performance deficit that we found, but there is no indication at all in the literature that the blood alcohol levels would be different if they had been drinking a different number of years, to my knowledge.

Q Well, then you're saying that if I have drunk a lot for five years and you haven't drunk any for five years, we are the same size people, both drink the same amount of whisky, that our blood alcohol count would be the same. Blood alcohol content would be the same?

A I really couldn't say that because there are some other factors like how long does it take you to drink it.

Q That is right. And about how much your stomach takes in.

A You get through eating before you drink or —

Q Something of that kind?

A We also found that introverts and extroverts apparently are most affected by alcohol. So, personality [124] makes a difference.

Q Well, is it fair to assume that in connection with your test that women just don't drink as much as men and you pit them together and give them this identical test, you're going to expect women to get a little drunker than men. Not remember as well.

A Well, one might make that assumption, except that one important part is, that there was no difference on the Immediate Memory Test between males and females. They both performed the same before alcohol. After they drank the alcohol, and on Immediate Memory, males and females performed very well. It was a Delayed Memory Test that the males and females differed.

To me, this is the case that there is a certain type

of memory that is more affected by alcohol in women than in men. That had differential, I think your argument would be quite valid.

Q Well, in the sum and substance of this experience that you have had here, was it women just get drunker than men, to put it crudely?

A Okay.

Q Is that right?

A Yes, sir.

Q Then I take it that we ought to turn this ordinance around, or this statute around and let the men get [125] it before the women?

A If it is based on the data, I would say that is true.

Q Well, would there be some basis then to do it this way, men ahead of the women, because women get drunker and therefore shouldn't have it as soon as men?

A If you were going to make a discrimination, that is the direction the discrimination should be made.

Q Classification, let's call it classification in the interest of public. People are going to get drunker quicker, it ought to be a little harder for them to get it?

A That depends on what they're going to do, if they're going to sit in the laboratory it is not going to hurt them.

Q What I am talking about is about driving an automobile and getting out on the streets.

A Correct.

I think one important thing that hasn't been brought out too much, and beginning, you must remember these are preliminary findings and we have a small number of subjects which has been pointed out. But, it appears as though the big difference comes within the premenstrual time for the women when premenstrual symp-

toms are quite frequently reported by both the female or husband or another [126] male is when the woman becomes emotional, sometimes, or depressed, and by putting alcohol on top of this, I think in that case at that particular time a woman would be more dangerous out driving than a man would be, who doesn't have this monthly hormone variation.

Q Well, then, sex differences in alcohol there is a difference?

A From our point of study, yes, preliminary study, yes.

Q But, I suppose that the difference that you find would indicate that contrary to what the State Legislature has done, women should not get alcohol as early as men since there is a difference in the result of consumption?

A I don't know what they base their opinion on. Apparently it wasn't on data, because as far as I know, this is the only study that has given males and females alcohol and also looked at the effects at different times in the types of menstrual cycle.

Q The interesting thing about your study is that there is a difference between the sexes about alcohol then?

A That is correct. Now, let me mention one other thing. We are working at small blood alcohol levels, around 06 to 08 percent. We are working below what is [127] legally considered to be intoxicated in the State of Oklahoma.

Q Well, do you have any reason to believe that it would change if you drank more?

A I don't think so.

Q Well, do you have any reason, have you made any tests to where this picture is going to change the more you drink?

A There is such a thing called "dose response effects".

Q Well, if you wanted to answer my question, you could just put more whisky to this —

A That is right.

Q Have you done this?

A We have with the males. But with the females, as I mentioned earlier, they get sick when you ask them to drink any more, which indicates they cannot tolerate as much alcohol as the males.

Now, to answer your question, if we took women —

Q Well, is there some biological difference then about the woman's ability to consume alcohol as against the man's ability?

A I don't know.

Q I understood the earlier witness to say there [128] wasn't. Now, you're saying there is, is that right?

A I am not saying there is a biological difference.

Q What is the difference? The woman gets sick, the man doesn't; and the woman get drunker than the man. Why isn't there a biological cause of this?

A Okay, remember what Dr. Ruffin mentioned about the proportion of water in the male and female? This is very, very important.

Q Well, there is a biological difference.

A There is a biological difference in the proportion of water in the way the alcohol is distributed to the system, that is correct, from what we know.

Q Thank you.

JUDGE HOLLOWAY: Anything further?

MR. GILBERT: None from the Plaintiffs, Your Honor.

JUDGE HOLLOWAY: May he be excused?

MR. GILBERT: Yes, sir.

JUDGE HOLLOWAY: You may be excused.

Anything further from the Plaintiffs?

MR. GILBERT: Yes, Your Honor, just documents. Let's see, I guess this will be numbered Plaintiffs' Exhibit No. 3. I previously furnished copies, Xeroxes, of relevant statistics from the Census of the 1970 Census of [129] the State of Oklahoma, showing statewide and Oklahoma City statistics regarding male and female populations for various age groups.

JUDGE HOLLOWAY: Any objections?

MR. MOORE: No objections.

JUDGE HOLLOWAY: Plaintiffs' Exhibit No. 3 is received.

MR. GILBERT: The Plaintiffs final exhibit will be 4, I believe.

It will be similar statistics from the United States, 1970 Census for the State of Minnesota, showing similar data.

JUDGE HOLLOWAY: Any objections to Plaintiffs' Exhibit No. 4?

MR. MOORE: No, Your Honor, none.

JUDGE HOLLOWAY: Plaintiffs' Exhibit No. 4 is in evidence.

MR. GILBERT: I believe the Court could actually take judicial notice of the census statistics anyway.

JUDGE HOLOWAY: Anything further? The Plaintiffs?

MR. GILBERT: No, Your Honor. The Plaintiff would rest.

JUDGE HOLLOWAY: Any rebuttal?

MR. MOORE: No, Your Honor.

JUDGE HOLLOWAY: Then the case is finally [130] submitted on evidence, I take it, from both sides?

MR. MOORE: Yes, sir.

JUDGE HOLLOWAY: Gentlemen, we have considered the question about argument. We have a difficulty in that we have another trial. This panel does, at 1:30, and we also have a situation that you have offered a great deal of evidence this morning which none of us have had an opportunity to examine, so we would like to request the parties to brief the case. I don't believe there have been any briefs really on the merits. You have submitted some on the burden of proof, so we would like to request the parties to brief the case and you have the burden for the State.

What time would you like for submitting a trial brief?

MR. MOORE: Your Honor, my sole problem is a physical one in terms of secretarial help. May I have 20 days? Is that too long?

JUDGE HOLLOWAY: Yes; and how much time would you like to have, please to reply?

MR. GILBERT: I think the same time, Your Honor. My secretary has just quit.

JUDGE HOLLOWAY: Well, we will allow you some time to receive the State's brief. You mean 20 days after that?

[131] MR. GILBERT: Well, I can probably squeeze it up closer than that, I think I can get it out in 15.

JUDGE HOLLOWAY: Fifteen days.

Very well, the Defendants will then submit their brief, formalizing the evidence and the authorities on the merits within 20 days. The Defendants will, the Plaintiffs will, thereafter, respond within 15 days.

MR. GILBERT: Very well.

JUDGE HOLLOWAY: Gentlemen, if we feel that oral arguments would be necessary or helpful to us, after we have received and studied your briefs and the evidence, we will adivse you. But, otherwise, we will consider whether we should take the case on the briefs. We will notify you then.

Court will be in recess until 1:30.
(Thereupon, these proceedings were concluded.)

[132] **CERTIFICATE**

I, R. Lee Cook, do hereby certify that I am a duly appointed, qualified and acting official court reporter in and for the United States District Court for the Western District of Oklahoma.

I further certify that the foregoing proceedings were taken by me in my official capacity in stenotype.

I further certify that my said machine shorthand notes were later transcribed and reduced to typewriting under my supervision and that the foregoing is a true and correct typewritten transcription of the proceedings had as aforesaid.

R. Lee Cook, Official Court Reporter
U. S. District Court
Western District of Oklahoma

ITEM 14 — PLAINTIFFS' ATTEMPTED EXHIBIT 1B (EXTRACT)

ACTIONS OF ALCOHOL

VOLUME I

BIOCHEMICAL, PHYSIOLOGICAL AND PSYCHOLOGICAL ASPECTS

VOLUME II

CHRONIC AND CLINICAL ASPECTS

by

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and

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with a Preface by
EBBE CURTIS HOFF *Richmond, Va., U.S.A.)*

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[180] *(3) Sexual and maternal functions*

A meager amount of research has been reported on alcohol effects on sexual reactions in spite of the importance of the topic. The results reveal a tendency to selective parasympathetic inhibition in the male. Thus prolongation of erection time was seen in dogs after 0.4 — 1.6 g alcohol per kg (Gantt, 1940, 1952, 1957). Sympathetic components in the sexual reflexes regulating ejaculation were also depressed by moderate and large doses of alcohol (0.8, 1.6 or 2.4 g/kg) but remained unaffected after a small dose (0.4 g/kg) which was sufficient to slow erection. In some cases, alcohol improved the sexual reflexes of psychologically disturbed dogs (Gantt, 1957). In rats, deprived of water so that they consumed voluntarily an amount of 2.3 — 2.8 g alcohol/kg body weight, this dose produced depression of all measures of copulatory behavior (Dewsbury, 1967). Latency to first mount, intromission and ejaculation were prolonged, pauses between intromissions were longer, and latency prolonged to resumption of copulatory behavior after ejaculation. On the other hand, fewer intromissions were required to attain ejaculation. According to Hart (1968), alcohol in a dose of 1.6 g/kg depressed the ejaculatory reflex in dogs with midthoracic spinal transection, and in a dose of 3.2 g/kg abolished the reflex in 6 out of 8 dogs. In intact dogs, the same doses of alcohol did not abolish interest in receptive females, but

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of 6 dogs none was capable of completing copulation after the larger dose of alcohol. Very similar observations have been made by Hart (1969) in rats.

Rasmussen (1953) observed the copulatory behavior of male rats after doses of alcohol which resulted in blood alcohol levels from about 0.03 — 0.18%. With increasing blood alcohol concentration, there was a progressive decrease in the numbers of attempted copulations, completed copulations, and ejaculations, and the ejaculations were delayed.

According to Teitelbaum and Gantt (1958), the sperm count of dogs was decreased by large doses of alcohol, but the authors considered this observation to be preliminary and in need of further confirmation. Doeptmer and Hinckers (1965) administered alcohol in doses of 0.4 or 0.8 g/kg to young, [181] healthy human males, determined the alcohol concentration in blood and seminal fluid, and recorded number and condition of the spermatozoa. The sperm number was not affected, but slowing of sperm motility and structural changes in the sperm cells were seen.

The estrous cycles of female mice, determined by vaginal smears, were disturbed when the drinking fluid consisted of a 10% alcohol solution and were almost abolished when a 20% solution was given (Cranston, 1958). Wine has been reported to cause irregulatiries in the estrous cycle of female rats, but no effect of a pure alcohol solution was found although the experiment extended over several months (Aron *et al.*, 1965).

The involvement of the nervous system in endocrine responses to ethanol was already seen in the effects of alcohol on secretion of antidiuretic hormone (p. 166) which shows a depression of the posterior hypophyseal lobe. Similarly, release of oxytocin is inhibited. Oxytocin is needed for milk ejection from the mammary glands,

and also induces contractions of the uterus. Chaudhury (1960, acc. to Chaudhury and Matthews, 1966) found that in female rats a dose of 2.95 — 3.95 g alcohol/kg inhibited the release of oxytocin in response to the suckling stimulus as assessed by a block in milk ejection. In rabbits, Fuchs and Wagner (1963 a, b) have demonstrated that the strength of suckling stimulus required to overcome the inhibiting action of ethanol on oxytocin release is a function of ethanol dosage. The same authors also demonstrated that previous administration of ethanol inhibits the release of oxytocin which can ordinarily be induced by intravenous injection of acetylcholine. On the other hand, nicotine-induced release of oxytocin is not blocked by ethanol (Bisset and Walker, 1957), which suggests an unrelated point of action of the two drugs. In several species, including the rabbits, coitus causes release of oxytocin. It has been suggested that the oxytocin by stimulation of uterus motility aids transport of seminal fluid up the reproductive tract. Chaudhury and Matthews (1966) have demonstrated that in female rabbits in estrus, administration of approximately 3.9 g of ethanol/kg body weight 30 min before mating prevents fertilization. Ethanol did not inhibit ovulation, but the mechanism of action remains obscure because also after injection of oxytocin, ethanol prevented fertilization.

Oxytocin, through its stimulating effect on the uterine myometrium, is an important factor in the regulation of parturition. Fuchs (1966) showed in rabbits that ethanol inhibits secretion of oxytocin during parturition and that it is capable of delaying onset of labor and inhibiting uterine contrac- [182] tions. Clinical trials suggested therapeutic value of ethanol in control of premature labor in humans (Fuchs *et al.*, 1967); Luukkainnen *et al.*, 1967). In the latter study, the quite moderate dosage of 30 ml cognac three times a day

apparently was beneficial. It was not clear whether the effect of ethanol was due to inhibition of oxytocin release, to a direct effect on the uterine myometrium, or to a combination of these effects. In continued studies, Wagner and Fuchs (1968) showed that ethanol inhibits release of oxytocin in response to suckling in women, uterine contractions being reduced to less than half by a blood concentration of 0.07%. According to observations by Fuchs (1966), Wagner and Fuchs (1968) and Fuchs *et al.* (1968), the responsiveness of the uterus to injected oxytocin is not altered by ethanol. Fuchs *et al.* (1968) also cite the unpublished observation by Landesman *et al.* that ethanol in concentrations up to 0.8% does not affect the contractility of human uterine strips *in vitro*. In humans, ethanol thus seems to prevent uterine contractions through inhibition of the release of oxytocin from the posterior part of the hypophysis. In mice, inhibition of contractility of uteri isolated in late pregnancy begins at a concentration of 0.08% w/v, and blockage is complete with 0.32% w/v. In the rat, the corresponding range is 0.8 — 2.4% w/v (Hüter and Schmitt, 1968). A perhaps overenthusiastic reaction to the first clinical reports has led to the critical remark (Anonymous, 1968) that many of the patients of Fuchs *et at.* (1967) might have been in false rather than in premature labor. It was further pointed out that additional studies are required of possible adverse effects both in the mother and in the infant. The cautionary remark is still valid, but the initial results have been sufficiently promising to indicate further study of this therapeutic use of ethanol.

An oral dose of 2.4 g alcohol per kg elicited maternal behavior in roosters toward young chicks (Kovach, 1967). This might indicate an increase in this specific feminine response tendency or might be due to suppression of the aggressive behavior characteristic of normal

roosters toward the small chicks.

° ° °

[430] C. Genetic, sex, and individual differences

° ° °

[438] *(2) Species and sex differences*

In contrast to the substantial number of studies comparing alcohol preference in different strains of rats and mice, there has been little research on other genetic determinants of alcohol consumption. Genetically determined differences are found among different species, and within the same species and strain between males and females. Comparisons between species and sexes involve a wide variety of different characteristics, no one of which can be identified with certainty as the determinant of differences in alcohol consumption. Nevertheless, useful information may be obtained by comparing alcohol consumption in different species and in the two sexes.

The preceding review of strain differences in rats and mice emphasizes differences in alcohol consumption within each species rather than differences between these species. Mardones (1960), in a review of studies on mice and rats, showed that mice generally consumed more alcohol in relation to body weight. This difference may be attributed to the higher rate of ethanol metabolism in the mouse (Chapter 2, Table 7). However, greater variability has been seen among strains of mice than rats. Figs. 1 — 3 of the present chapter indicate that alcohol concentrations of 5% or even higher are not avoided by rats, and many of the animals drink more alcohol than water at these concentrations. However, one strain of mouse (DBA/2) avoids alcohol at a concentration as low as 0.05% (Thomas, 1969).

Several experimenters have reported high alcohol

preference in hamsters. Emerson *et al.* (1952) found very high voluntary consumption of 10% alcohol by hamsters and deer mice, whereas little alcohol was consumed by cotton mice and usually by albino rats of Sprague-Dawley straing. Aschkenasy-Lelu (1960b), with a choice between water and a 5% alcohol solution, found the highest daily alcohol consumption by hamsters (5.2 g/kg); the consumption was much lower in mice (2.4 g/kg) and still lower in rats (1.4 g/kg). Arvola and Forsander (1961), with a choice between a 10% alcohol solution and water in six species, found that the golden hamster was the only one which drank larger amounts of the alcohol solution than water. The other species, in descending order of alcohol preference, were the rabbit, hedgehog, albino rat, albino mouse, and guinea pig. Consumption of several alcohol concentrations by the hamster, studied by Arvola and Forsander (1963), was summarized in Fig. 8-5. Estimating the average body weight at 100 grams, the alcohol intake by hamsters, with a choice between a 40% solution and water, averaged more than 8 g/kg/day. The high consumption of alcohol [439] by this species might be due to the fact that hamsters are desert animals, accustomed to bitter tasting substances, so that their aversion of the strong taste of alcohol might be minimal.

There may be particular value in the study of alcohol consumption by species which more closely resemble humans in size and in cortical development. Nevertheless, very few experimenters have tested alcohol consumption in such species. Baïsset and Montastruc (1962) reported that dogs consumed only about 0.4 g/kg/day in a choice between a 20% alcohol solution and water. After 6 months of administration of 6.4 g/kg/day, their voluntary intake increased to about 4 g/kg/day. Large amounts of daily alcohol consumption by primates have been re-

ported in the few studies on these animals most closely related to humans. During prolonged choice between a 15% alcohol solution and water, Mello and Mendelson (1966) found wide variation in alcohol consumption by four rhesus macaque monkeys, up to a maximum of 6.1 g/kg/day. Koz and Mendelson (1967) found that during prolonged periods of free choice between a 10% alcohol solution and water, average daily alcohol consumption by two rhesus speciosa monkeys ranged from 4 to 8 g. The authors did not report the body weights of the animals. Clark and Polish (1960) reported that during choice between a 20% alcohol solution and water, average alcohol intake by two rhesus monkeys ranged from approximately 0.7 to 2.3 g/kg/day. Anderson and Smith (1963) reported on choice tests in Macaca nemestrina (Pigtail) monkeys. The data indicated substantial amounts of alcohol consumption although some of the tests were preceded by fluid deprivation, which would be expected to enhance preference for water over alcohol. Consumption of intoxicating amounts of alcohol was reported by Fitz-Gerald *et al.* (1968), who offered to chimpanzees and orangutans a fruit juice (grape, orange, or grapefruit), with or without the addition of a 10% concentration of ethanol or vodka. The alcohol greatly decreased the amount of juice consumed, but in the brief drinking period, averaging 10 min, alcohol consumption often exceeded 1 g/kg. Intoxication was observed in several of the chimpanzees.

A consistent finding, in all species of vertebrates tested in the laboratory, is the avoidance of intoxicating doses of alcohol. However, an attractive concentration of alcohol induces drinking to intoxication in flies, according to data on blowflies reported by Dethier (1961) and on other species of flies cited in that article. This one study on blowflies, also cited earlier in the present

chapter (p. 427), is an example of the wide variety of available species, most of which have never been tested for alcohol consumption.

[440] Reports on sex differences in alcohol preference have been rather conflicting. The valid comparison is for alcohol intake in relation to body weight, so that the experimenter should report both the amount of alcohol consumption and the average weights of the animals. Since males are usually heavier, and also may consume less fluid due to their lower surface/volume ratio, equal alcohol intake in g/kg/day may require a much higher percentage choice of alcohol by males in relation to total fluid intake. These factors may partly account for the higher percentage alcohol choice in male rats reported by Clay (1964) and the larger amount of alcohol consumption in male hamsters reported by Arvola and Forsander (1963). Fitz-Gerald *et al.* (1968), in presentations of a single beverage containing 10% alcohol, found that male chimpanzees drank almost twice as much alcohol as females whereas male and female orangutans drank the same amount, in comparisons between males and females with approximately equalized body weights. In choice tests with rats, Schadewald *et al.* (1953) found that males consumed more alcohol in g/kg/day but Aschkenasy-Lelu (1960c), Eriksson and Malmström (1967), Brewster (1969), and Eriksson (1969a) found that females consumed more alcohol in g/kg/day. Eriksson and Malmström (1967) also found faster alcohol elimination in female rats, and Eriksson (1969a) reported that the sex difference in alcohol comsumption was greater in the heavy-drinking than in the light-drinking strain of rats, in accordance with the expectation that the faster metabolism in females would be a more influential determinant when alcohol intake was at a high level. In mice, Mirone (1952) reported higher alcohol consump-

tion by males but Eriksson and Pikkarainen (1968) found higher alcohol consumption by females in g/kg/day, and this sex difference was greater in the alcohol-preferring strain (C57BL) than in the CBA strain, again giving evidence that the faster metabolism in females is more influential when alcohol intake is at a high level. A tendency for higher alcohol preference in females than males of the C57BL strain, but not of low-preference strains, was found under limited food rations (Rodgers *et al.*, 1963) but not in other choice tests (McClearn and Rodgers, 1961). This finding has been confirmed by Eriksson (1970).

Most experimenters on rats and mice have found little sex difference in alcohol consumption (*e.g.* Mardones, 1960; Rodgers and McClearn, 1962a). Differences between males and females may be influenced by a variety of conditions which generally have not been tested systematically in both sexes. The alcohol intake of females is affected by the stage of the reproduction cycle. Studies of this variable are reviewed in the present chapter (p. 445).

Fig. 8-6. Lactate/pyruvate ratio of liver 90 min after alcohol injection related to preceding choice in tests with water and a 10% concentration of alcohol, in 21 male and 28 female rats. The data for males are from Forsander (1966).

ITEM 15 — PLAINTIFFS' ATTEMPTED EXHIBIT 1B (EXTRACT)

PRIVY COUNCIL

MEDICAL RESEARCH COUNCIL

MEMORANDUM

No. 38

Effect of Small Doses of Alcohol on a Skill Resembling Driving

G. C. DREW, W. P. COLQUHOUN and HAZEL A. LONG

London

Her Majesty's Stationery Office

Universal Decimal Classification
615.711.1

[iii] PREFACE

The work described in this Memorandum was carried out by the authors on behalf of the Committee on Road Users, appointed jointly by the Medical Research Council and the Road Research Board of the Department of Scientific and Industrial Research. A summary of the main findings has already been published in the British Medical Journal; in addition to the information given there the present Memorandum includes full details of the results and of the experimental method used, together with a survey of earlier work on the physiological effects of alcohol and its effects on behaviour.

The term intoxication, in relation to the drinking of alcohol, is generally used to denote a change in behaviour associated with certain clinical signs such as slurred speech and staggering gait. Some deterioration in efficiency and control, however, almost certainly occurs before these signs appear, and this may well be significant in situations calling for continuous attention and for speed and accuracy of action.

Laboratory studies and also investigations of actual road accidents have suggested that, when the level of alcohol in the blood is relatively high, its measurement may provide a more reliable basis than clinical observation for assessing the impairment of ability to perform a skilled task such as driving a motor vehicle. There is less evidence on the value of blood alcohol measurements at lower levels when clinical signs will usually be absent.

The present study was designed to investigate the effects of small amounts of alcohol which would produce concentrations in the blood below those regarded in a number of countries as evidence of intoxication and within the range of those reached in ordinary social drinking. The 40 men and women studied undertook in the laboratory a series of tests on an experimental task which in a simplified form resembled driving a vehicle on the road.

The main findings regarding the relationship be-

tween performance of the task and the observed blood alcohol levels are presented in terms of the average effects on a group of individuals. They show that, in general, performance begins to deteriorate with very low blood alcohol levels and that deterioration progresses as the blood alcohol level rises. There was, however, a wide variation in the effect of alcohol on different individuals, and about a quarter of those tested showed reduced error after alcohol, although most of these did so only by a compensatory reduction of speed. The authors have made some attempt to assess the importance of various personal factors which may account for these individual differences.

Recognition of the existence of individual variation in response to alcohol should not be allowed to obscure the principal result of the study described in this Memorandum. Evidence has been obtained that a high proportion of individuals show a measurable impairment of performance after drinking amounts of alcohol too small to produce even those clinical signs of intoxication apparent to trained observers.

Medical Research Council,
38 Old Queen Street,
London, S.W.1 10th November 1959

° ° °

[55] *Sex* There were no significant differences between the sexes in the effect of alcohol on any of the performance measures (Student's t: $P > .05$, in each case). However, it should be remembered that only five of the subjects were women.

° ° °

ITEM 16 — PLAINTIFFS' EXHIBIT 2 (ENTIRE)

SEX DIFFERENCES IN RESPONSE TO ALCOHOL°

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SEX DIFFERENCES AND ALCOHOL

[2] Abstract

Thirty college students were tested at two week intervals to evaluate the effects of alcohol (0.66% milliliters per kilogram) on memory at different times in the female menstrual cycle and to compare this to the performance of a group of males. Subjects were tested on a free recall verbal memory task before drinking alcohol (baseline) and then at a blood alcohol level of 0.04% on the ascending limb and also at 0.04% on the descending limb of the blood alcohol curve. Ten females were tested first on approximately day 1 and then on day 14 of the menstrual cycle while ten other females were tested first on day 14 and then on day 1. A group of ten males was also tested twice at two week intervals. Females obtained a significantly higher peak blood alcohol level than males on the equivalent dose of alcohol. Females tested during the premenstrual phase reached significantly higher peak blood alcohol levels and demonstrated significantly faster absorption rates than females

°This research was supported in part by Public Health Service grant 14702 from the National Institute of Mental Health subproject "neuropsychological concomitants of alcohol" under the direction of Oscar A. Parsons and Ben M. Jones.

tested at other phases in the menstrual cycle. Alcohol impaired both immediate and delayed recall on the memory task for all subjects with immediate memory being more impaired on the ascending than on the descending limb. However, females were more impaired by alcohol than males on delayed recall but not on immediate recall. Performance differences were not found for females tested at different phases in the menstrual cycle or between females taking and not taking birth control pills. These results indicate that females become more intoxicated than males on the equivalent dose of alcohol, especially if they drink during the premenstrual phase. It also appears that females are more impaired than males by alcohol on [3] tasks that require an inhibition or delay of response. These differences should be considered in future research and suggest that sex hormonal levels may be related to the effects of alcohol.

[4] Key Words

Alcohol	Ascending Limb
Sex Differences	Descending Limb
Menstrual Cycle	Peak Blood Alcohol Level
Immediate Memory	Absorption Rate
Delayed Memory	Elimination Rate

[5] Several studies have reported that alcohol affects test performance of males and females differentially. Reisby (1972) reported that while there was no performance difference between males and females before alcohol ingestion, that females were more impaired than males by alcohol on motor coordination tests, while males were more impaired than females on an attention task. However, there were a number of tasks that did not differentiate between males and females during alcohol intoxication. Munkelt, Lienert, Frahm & Soehring (1962), as quoted by Reisby (1972), reported a deterioration of performance in female subjects in all sensorimotor and emotional variables following alcohol ingestion. However, it was not clear if these alcohol effects were different for males and females.

Sex differences in response to alcohol may be related to several factors. First, the task employed to measure the performance of males and females may be critical. Broverman, Klaiber, Kobayashi & Vogel (1968) have suggested that females perform better than males on cognitive tasks that require an immediate response, while males perform better than females on cognitive tasks that require a delayed response. Although there is controversy concerning this theoretical dichotomy (Singer & Montgomery, 1969; Parlee, 1972), it appears important to evaluate the effects of alcohol on males and females along this dimension to determine if performance differences can be attributed to the nature of the task.

A second factor that may be related to differences in performance between males and females following acute alcohol ingestion is the cyclic fluctuation in female sex hormonal levels as compared to the relatively constant male sex [6] hormonal level. Several studies have reported that alcohol has a greater effect on animals when the sex hormonal levels are low (Kask, 1929; Klotz, 1937; Stortebecker, 1937; Goldberg & Stortebecker, 1943). This effect was demonstrated in both male and female animals following castration. The effects of alcohol were reduced to normal when the animals received a dose of the appropriate sex hormone. This suggests that the normally occurring fluctuation in the human female sex hormones may interact with the effects of alcohol. Thus, performance under the influence of alcohol may be related to the day in the menstrual cycle when the female is tested.

The third factor related to sex differences in re-

sponse to alcohol pertains to a methodological issue and is related to alcohol dose. Females are known to have less water per unit of body weight than males (Bell, Davidson & Scarborough, 1968). Since alcohol is distributed uniformly throughout the water in the body tissues, then it might be expected that the same dose of alcohol calculated on total body weight would result in a slightly higher peak blood alcohol level in females than in males. Although this theoretical sex difference is being applied in courts of law (Lovell, 1973), there is little, if any, direct empirical data supporting it. If this sex difference is consistent, then it would be important to adjust the dose accordingly or to control for a possible difference in peak blood alcohol level by testing each subject at a specific blood alcohol level.

The purpose of the present study was to compare the effects of alcohol on cognitive performance in group of males to two groups of females tested at different times during the menstrual cycle. A free recall verbal memory task previously reported to be sensitive to the effects of alcohol was employed (Jones, 1973). This particular cognitive task was chosen for three reasons. [7] First, an immediate and a delayed recall score can be obtained that could be used in evaluating the Broverman *et al.* (1968) hypothesis concerning sex differences on cognitive tasks. Second, Klaiber, Broverman, Vogel, Abraham & Cone (1971) have reported that cognitive abilities are sensitive to changes in sex hormonal levels. Thus, a cognitive task would be appropriate to test performance differences at different days in the menstrual cycle. Third, this task is relatively short and has been administered at specific blood alcohol levels on both the ascending and descending limbs of the blood alcohol curve (Jones, 1973). Thus, possible differences in peak blood alcohol levels between males and

females could be taken into consideration by testing all subjects at the same blood alcohol level regardless of the resulting peak blood alcohol level.

Methods

Subjects. Thirty paid volunteer college students served as subjects. All subjects characterized themselves as moderate social drinkers. Group I consisted of 10 male subjects, Group II consisted of 10 female subjects who were tested on approximately the first day of menstruation (Day 1), and Group III consisted of 10 females tested at the approximate time of ovulation (Day 14). Subjects in each of the three groups returned in two weeks for an identical testing session. The first day of menstruation was chosen for two reasons. First, both progesterone and estrogen, the two principle female sex hormones, fall to a low level to induce menstruation (Somerville, 1972). This period then represents a time of low sex hormonal levels. Second, the beginning of menstruation can be identified easily. This was important since the appropriate assay techniques were not readily available to analyze absolute levels of [8] estrogen and progesterone. The fourteenth day of the menstrual cycle was chosen since it is about midway between the end of menstrual flow and the beginning of the premenstrual phase, both of which may be associated with physiological and psychological discomfort. Thus, Day 14 is considered a "normal" time and is also related to ovulation in normal menstruating women. Estrogen levels are usually high right before ovulation, then fall, inducing ovulation. This point in the menstrual cycle should reflect relatively high sex hormonal levels as compared to Day 1. It also should be noted that 10 females, five in each group, were taking birth control pills. The effect of the pill is to keep the estrogen level from

falling on Day 14, thereby inhibiting ovulation. Females on the pill should have higher sex hormonal levels than those not on the pill on Day 14. Since the usual procedure is to stop taking the pill several days before the normal time of beginning of menstruation to allow the sex hormonal levels to drop, then there should be no differences between the female groups in sex hormonal levels on Day 1. The mean length of the last menstrual cycle was 29.20 and 28.40 days and the mean length of the menstrual flow was 4.80 and 6.20 days for Group II and Group III, respectively. These differences were not significant.

The female subjects also were given the Menstrual Distress Questionnaire (MDQ) as developed by Moos (1968) to evaluate symptoms associated with the menstrual cycle. The MDQ was scored according to the eight separate clusters of symptoms: pain, concentration, behavioral changes, autonomic reactions, water retention, negative affect, arousal, and control (Moos, 1968). The only significant difference between groups was that Group III has a greater negative affect than Group II. The scores were comparable to those reported by Moos (1968) [9] and indicated that, in general, females volunteering for this alcohol project had few symptoms associated with the menstrual cycle.

All subjects were instructed to obtain a regular night's sleep before the testing day and not to drink alcohol beverages or take medication the night prior to testing or on the day of testing. Subjects were asked to eat a light breakfast about 9:00 a.m. on the day of testing and not to eat, drink, or smoke from that time until reporting to the laboratory. Subjects were tested from 1:00 to 5:00 p.m. and were escorted home following the completion of testing. All subjects were asked to return two weeks later for a second identical testing. The verbal

memory task primarily was administered the second time to keep conditions constant in evaluating the blood alcohol variables since practice effects would be expected with repeated testing on this task. Five females and one male did not return for the second testing.

Alcohol Concentration. Subjects received 0.66 milliliters of 95% USP ethanol per kilogram of body weight mixed with orange drink in the ratio of four parts of orange drink to one part of ethanol. A pilot study in our laboratories showed this dose to produce a peak blood alcohol level of about 0.06% in a group of males. Subjects were asked to consume the beverage in five minutes. Drinking time was strictly controlled since it has been reported that drinking time is related to cognitive performance (Jones and Vega, 1973). The means and standard deviations for weight in kilograms and amount of absolute alcohol consumed was 69.36 $\pm$ 14.29 kg and 45.75 $\pm$ 9.46 milliliters of ethanol for the 10 males and 62.90 $\pm$ 9.52 kg and 41.54 $\pm$ 6.30 milliliters of ethanol for the 20 females. Although the females weighed slightly less than the males and drank less alcohol, these differences were not significant.

[10] *Breathalyzer Samples.* Immediately after the subjects finished drinking, they rinsed their mouth with water to clear it of residual alcohol. Breath samples were taken continuously throughout the afternoon at five-to-ten minute intervals, as well as before and after each test period (Stephenson Breathalyzer, Model 900), to obtain estimates of the blood alcohol levels. High correlations between Breathalyzer samples and direct blood analyses ($r = 0.956$) have been reported in a recent review of the validity and reliability of the Breathlyzer (Dubowski, 1970). The first two breaths were usually invalid; valid breath readings were obtained about fifteen minutes after end of drinking which agreed with

other reports (Spector, 1971; Jones & Vega, 1972; Jones, 1973).

Blood Alcohol Variables. Peak blood alcohol level and time to reach peak were determined for each subject. Three measures of absorption rate also were calculated. The initial absorption rate was determined by dividing the first valid breath reading by the time required to reach this value. This occurred about 15 minutes after the subject finished drinking. A later absorption rate was calculated by including all the valid breath readings on the ascending limb to and including the peak blood alcohol level in a regression equation. A third overall rate was determined by dividing the peak blood alcohol level by the time to reach peak. The elimination rate of alcohol was determined by including all the blood alcohol values obtained after peak in a regression equation.

Tests. Subjects were given the Shipley Institute of Living Scale and the Eysenck Personality Inventory to measure basic intellectual functioning and personality factors, respectively before drinking alcohol. Subjects were then tested on a free-recall verbal memory task as described by Glanzer (1971) and previously reported by Jones (1973). A total of 216 monosyllabic high-frequency [11] nouns were drawn from the Thorndike-Lorge (1944) AA lists and randomly assigned to 18 lists with 12 words per list. Each word was printed in black on a white background with one word per slide. The words were displayed on a screen with a 35 mm Carousel projector. Following Glanzer's study (1971), each slide was on for one second with a one second interval between slides. The screen was approximately three feet from the subject. Total time for each list was 24 seconds. The subjects read each word aloud over a tape recorder and started writing words immediately after termination

of the twelfth word. Subjects were allowed one minute free-recall period to write their responses. The next list was presented 30 seconds after responses to the previous list were obtained.

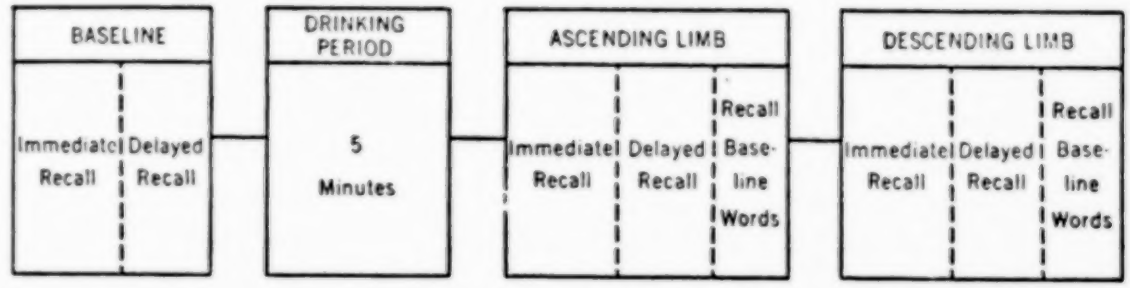

Figure 1. Block diagram of procedure.

A block diagram of the procedure is presented in Figure 1. The 18 lists were divided into three groups of six lists per group. Group 1 lists were presented to subjects before alcohol in order to obtain baseline measures for immediate and delayed recall. The immediate recall score was the total words correct for the individual recall of each of the six lists (72 possible). Thirty seconds after recall of the sixth list, subjects were given five minutes to recall words from all six lists in any order. This was the delayed recall score. A five-minute drinking period immediately followed this immediate recall task. Subjects were given Group 2 lists when they reached 0.04% on the ascending limb and Group 3 lists after they reached peak and were at 0.04% on the descending limb. Immediate and delayed recall scores were obtained at both times. Recall of baseline words was obtained on both the ascending and descending limbs after presentation of the new words. A placebo group was not included in this study since previous research with this identical task indicated no significant change over three testing sessions (Jones, 1973).

[12] *Data Analyses.* The data were analyzed by a 3 (Groups) x 3 (Testing Period) analyses of variance. The main effect of Testing Period (a repeated measure) and its interactions were evaluated by using conservative degrees of freedom. Simple effects and individual comparisons were evaluated by F-tests.

[26] *Table 1*

Means and Standard Deviations for Age, Education, Shipley Institute of Living Scale and Eysenck Personality Inventory Scores for the Male and Female Groups

		Males (n = 10)	Females (n = 10) (Day 1)	Females (n = 10) (Day 14)
Age	$\bar{X}$	21.90	28.40	26.80
	SD	3.14	9.65	5.88
Education	$\bar{X}$	15.10	16.70	15.60
		2.08	2.11	2.07
Shipley				
Vocabulary	$\bar{X}$	31.90	32.70	33.70
	SD	3.98	4.72	3.30
Abstract	$\bar{X}$	34.67	34.00	34.80
	SD	3.46	5.66	3.91
WAIS*	$\bar{X}$	116.70	117.80	117.60
	SD	6.04	10.36	4.70
Eysenck				
Extraversion	$\bar{X}$	11.80	13.00	11.60
	SD	2.82	2.75	3.10
Neuroticism	$\bar{X}$	9.00	8.40	9.90
	SD	6.78	3.57	5.86
Lie	$\bar{X}$	3.20	2.33	2.11
	SD	1.75	1.41	0.78

* Estimated WAIS Full Scale I.Q. from total Shipley raw score corrected for age (Paulson & Lin, 1970).

Results

Means and standard deviations for age and education are presented in Table 1. The females were slightly older than the males, but this difference was only significant for males as compared to females tested on Day 14 ($t = 2.32$, $p < .05$). All three groups were comparable on education. Means and standard deviations for the Shipley Institute of Living Scale and the Eysenck Personality Inventory scores also are presented in Table 1. There were no significant differences among groups in intellectual levels as measured by the Shipley vocabulary, abstract or WAIS Full Scale I.Q. as estimated from the total Shipley score corrected to age (Paulson & Lin, 1970). Groups also were not significantly different on personality factors such as extraversion or neuroticism or on the lie scale as measured by the Eysenck Personality Inventory.

Blood Alcohol Levels. Means and standard deviations for the blood alcohol variables are presented in Table 2. Females as a group obtained a significantly higher peak blood alcohol level than males ($t = 2.38$, $p < .05$). There were no significant differences between males and females on any of the other blood alcohol variables. The two female groups were not significantly different from one another on any of the blood alcohol variables.

[13] *Immediate Recall.* Means and standard deviations for immediate recall during baseline and on the ascending and descending limbs of the blood alcohol curve for the three groups are presented in Table 3. A 3 (Groups) x 3 (Testing Period) analysis of variance indicated no significant difference among groups ($F = 0.47$, N.S.).

[27]

Table 2

Means and Standard Deviations for Blood Alcohol Variables for First Testing of Males and Females

	Peak BAL %	Time to Peak (min.)	Absorption Rate Initial Rate	Absorption Rate Later Rate (b)	Peak Time	Elimination Rate (b)
Males						
$\bar{X}_{10}$	0.0630	39.00	0.1677	0.0806	0.1082	0.0183
S.D.	0.0086	15.25	0.0825	0.0574	0.0363	0.0096
Females (Day 1)						
$\bar{X}_{10}$	0.0725	36.00	0.2347	0.1138	0.1522	0.0180
S.D.	0.0146	15.88	0.1034	0.1083	0.0913	0.0079
Females (Day 14)						
$\bar{X}_{10}$	0.0715	40.30	0.1903	0.0945	0.1334	0.0220
S.D.	0.0091	18.42	0.0622	0.0610	0.0754	0.0073

[28]

Table 3

Means and standard deviations for immediate and delayed recall during baseline and on the ascending and descending limbs of the blood alcohol curve for males, females tested on Day 1, and females tested on Day 14.

	Baseline		Ascending Limb		Descending Limb	
	Immediate	Delayed	Immediate	Delayed	Immediate	Delayed
Males (n=10)						
$\bar{X}$	39.00	20.70	32.50	11.80	36.40	12.60
SD	9.23	8.77	7.50	7.08	8.96	7.38
Females (n=10) Day 1						
$\bar{X}$	39.50	19.60	30.60	6.80	34.10	5.90
SD	6.54	6.92	6.95	3.49	4.89	3.31
Females (n=10) Day 14						
$\bar{X}$	41.30	20.30	34.60	8.90	36.30	9.30
SD	6.78	4.27	6.26	6.17	4.47	5.08

The main effect of Testing Period was highly significant ($F(2,54) = 21.10$, $p < .01$) while the Groups X Testing Period interaction was not significant ($F = 0.82$, N.S.). The Newman-Keuls procedure revealed that immediate memory was impaired on both the ascending ($p < .01$) and on the descending ($p < .01$) limbs as compared to baseline. Performance on the descending limb was significantly better than performance on the ascending limb ($p < .01$). This is consistent with a previous study that found a similar memory impairment at a blood alcohol level of 0.08%.

Delayed Recall. Means and standard deviations for delayed recall during baseline and on the ascending and descending limb for the three groups also are presented in Table 3. The main effect of groups ($F = 1.80$, N.S.) and the Groups X Testing Period interaction ($F = 1.17$, N.S.) were not significant. A significant main effect of Testing Period was obtained ($F(2,54) = 67.61$, $p < .01$).

Comparison of the limbs revealed that delayed recall was impaired on both the ascending ($p < .01$) and descending ($p < .01$) limbs as compared to baseline. However, performances on the ascending and descending limbs were not significantly different.

Since there were no significant baseline differences between males and females, an analysis was also carried out on only ascending and descending limb performances for the males ($n = 10$) and the combined females ($n = 20$) for both [14] immediate and delayed recall. No significant difference was found between males and females for immediate recall. A significant group effect was found for delayed recall ($F\ (1,20) = 5.53$, $p < .05$) which revealed that the males performed better than the females.

Immediate vs. Delayed Recall. It appeared that alcohol affected delayed memory more than immediate memory. A 2 (Groups) X 2 (Recall) X 2 (Limb) analysis was carried out to determine if alcohol affected immediate and delayed recall differentially. Since the baseline scores were different for immediate and delayed recall, both scores were converted to percent by dividing performance on the ascending limb and performance on the descending limb each by the respective baseline score for each subject. This percent change score analysis revealed a significant group effect ($F\ (1,28) = 5.76$, $p < .05$) with females demonstrating a greater alcohol effect overall. A highly significant recall effect was also obtained ($F\ (1,28) = 127.04$, $p < .01$), indicating that alcohol affected delayed recall to a greater extent than immediate recall. This is illustrated in Figure 2. Neither the main effect of limb nor any of the interactions was significant.

These results indicate that females are more impaired by alcohol than males on the delayed recall task.

However, no differences were found between groups of females tested on Day 1 and Day 14.

Serial Position Curves. Serial position curves for the immediate memory task during baseline and on the

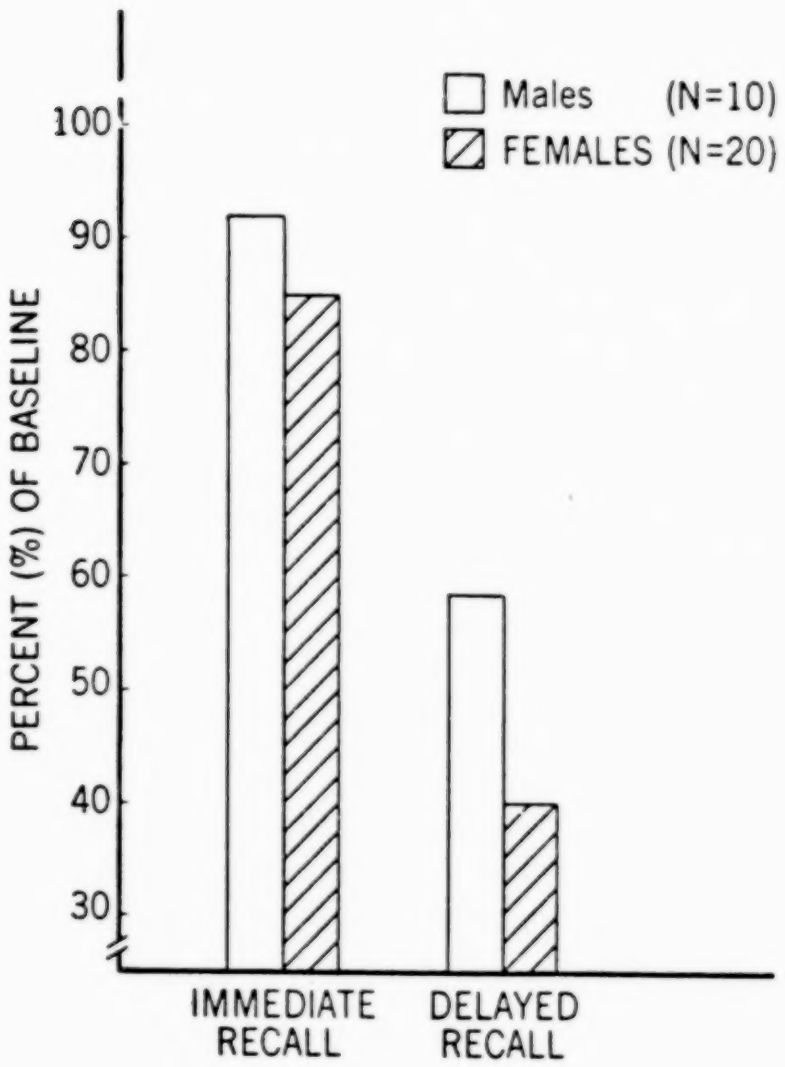

Figure 2. Immediate and delayed recall during alcohol for males and females expressed as percent change of baseline.

ascending limb for the combined males and females are presented in Figure 3. The main effect of alcohol was on recall of words from the first half of the list; those words that are reported to be in long-term storage (LTS) (Glanzer, 1971; Jones, 1973). There was little [15]

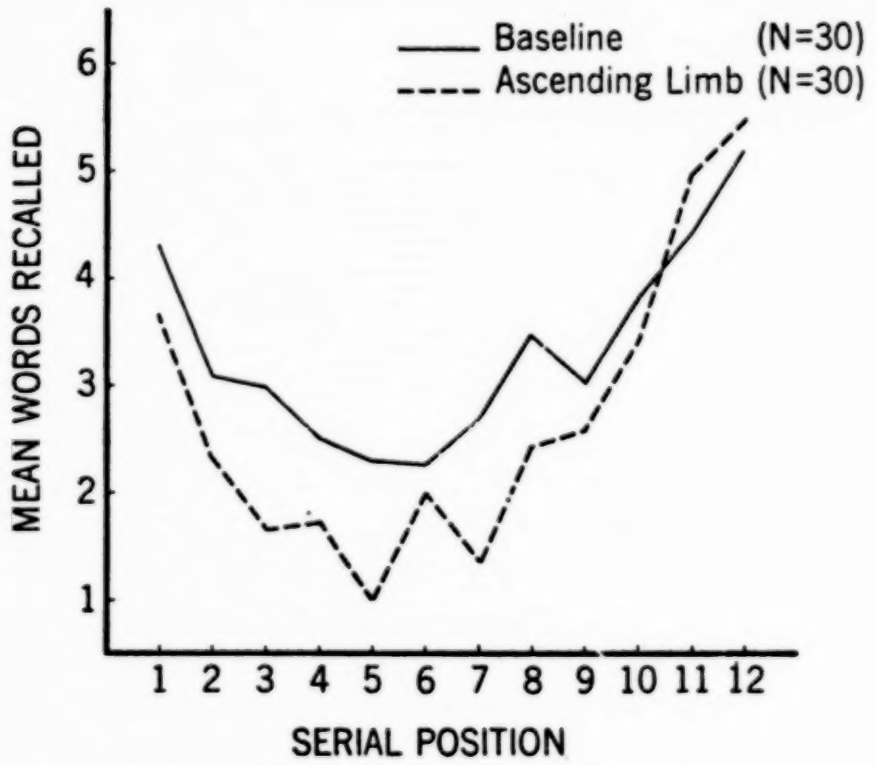

Figure 3. Mean words recalled across serial positions during baseline and on the ascending limb of the blood alcohol curve for 10 male and 20 female subjects combined.

effect of alcohol on recall of words from the last part of each list; those words that are in short-term storage (STS).

Pill vs. No Pill. Means, standard deviations and t-values for blood alcohol variables for females taking and

not taking birth control pills are presented in Table 4. The general trend was for females on the pill to absorb alcohol slower by taking longer to reach their peak blood alcohol level which is slightly lower than for females not on the pill. Elimination rates were virtually identical for the two groups. Analysis of the memory data revealed no difference between the two groups in baseline performance or performance during the alcohol state for either immediate or delayed recall.

Re-Test Data. A total of 24 subjects were tested twice: 9 males, 7 females from the Day 1 group, and 8

[29]

Table 4

Means, Standard Deviations and t-Values for Blood Alcohol Variables for Females Taking and Not Taking Birth Control Pills

	Peak BAL	Time to Peak	Absorption Rate			Elimination Rate
	%	(min)	Initial Rate	Later Rate(b)	Peak Time	(b)
Females (No Pill)						
$\bar{X}_{10}$	0.0760	32.10	0.2402	0.1407	0.1758	0.0198
SD	0.0129	15.36	0.0943	0.1062	0.0911	0.0063
Females (Pill)						
$\bar{X}_{10}$	0.0680	44.20	0.1847	0.0676	0.1097	0.0203
SD	0.0098	16.86	0.0712	0.0374	0.0590	0.0092
t-Value	1.57	1.68	1.49	2.06*	1.93*	0.15

* $p < .05$, one-tail test

females from the Day 14 group. There were no significant changes from Time 1 to Time 2 for either the Shipley or the Eysenck measures in any group.

Blood Alcohol Variables. There were no significant changes from Time 1 to Time 2 in blood alcohol variables for any of the three groups. Correlations between the Time 1 and Time 2 blood alcohol variables were generally high for all three groups and similar for males and females. There were no significant differences between males (n = 9) and females (n = 15) on blood alcohol variables on Day 2. Analyses were carried out on the blood alcohol variables for the five females on Time 1 who did not return on Time 2, as compared to the 15 who did return for Time 2 testing. The time to reach their peak blood alcohol level was significantly faster for these five dropout subjects ($t = 3.11$, $p < .01$) than for the other 15 subjects for Time 1. Later absorption rate ($t = 3,05$, [16] $p < .01$), peak blood alcohol level divided by time to reach peak ($t = 2.37$, $p < .05$) and elimination rate (2.13, $p < .05$) were all faster for the five dropout subjects. Although the dropouts had a higher peak blood alcohol level than the others, this difference did not reach statistical significance ($t = 1.99$, N.S.). It appears that this selection factor due to the dropouts resulted in the failure to obtain a significant difference on Time 2 between males and females on peak blood alcohol level. Since there was no significant change in blood alcohol variables from Time 1 to Time 2, analyses were carried out on the blood alcohol variables between Day 1 and Day 14 for the subjects tested twice. There were no statistically significant differences.

One explanation for the failure to find significant differences between the two female groups might have been related to a variation in the day of the menstrual

cycle on which they were actually tested. A review of the data indicated that some women had been tested several days before onset of menstruation since they were not able to be scheduled on the exact day or simply misjudged the beginning of their menstrual cycle. Since there were no significant differences in blood alcohol variables between first and second testings, the two testing sessions were combined to evaluate possible differences among days 1 to 3 (menstrual period), days 13 to 18 (inter-menstrual period) and days 21 to 28 (premenstrual period). A total of 34 testing sessions was included in the analysis. Eight women were tested during

[30]

Table 5

Means, standard deviations and t-values for blood alcohol variables during different days of the menstrual cycle.

	Days of the Menstrual Cycle				
	I	II	III	t-value	
	1-3 (n=8)	13-18 (n=14)	21-28 (n=12)	I vs III	II vs III
Peak Blood Alcohol Level (%)					
$\bar{X}$	0.0638	0.0679	0.0800	3.10**	2.73*
SD	0.0109	0.0101	0.0116		
Time of Peak (min.)					
$\bar{X}$	42.75	40.43	35.75	NS	NS
SD	7.85	18.95	17.72		
Absorption Rate (%/hr.)					
Initial					
$\bar{X}$	0.1584	0.1697	0.2479	2.22*	2.47*
SD	0.0851	0.0629	0.0930		
Peak BAL/Time					
$\bar{X}$	0.0938	0.1255	0.1636	2.72*	NS
SD	0.0321	0.0692	0.0796		
Elimination Rate (%/hr.)					
$\bar{X}$	0.0158	0.0181	0.0227	NS	NS
SD	0.0091	0.0084	0.0071		

* $p < .05$
** $p < .01$

menstruation, 14 during the inter-menstrual period, and 12 during the pre-menstrual period. Five women were only tested once and one subject was tested on day 9 and was not included in this analysis. The blood alcohol variables for these three phases of the menstrual cycle are presented in Table 5. Significantly higher [17] peak blood alcohol levels and faster absorption rates were found during the pre-menstrual period as compared to either the menstrual or the inter-menstrual times. Significant differences were not obtained for time to reach peak or for elimination rate. There were also no significant differences in performance on the memory task on either the immediate or delayed recall among the three menstrual times.

Comparisons of females tested during the pre-menstrual period with the 10 males revealed that the females obtained a significantly higher peak blood alcohol level than the males ($t = 3.86$, $p < .01$) as well as having faster initial absorption rates ($t = 2.14$, $p < .05$) and faster overall absorption rates as determined by dividing the peak blood alcohol level by time to reach peak ($t = 2.16$, $p < .05$). The peak blood alcohol levels for the males and the three groups of females are illustrated in Figure 4. No significant differences were found between the males and any of the three female groups for time to reach peak or elimination rate.

Discussion

These results indicate that females are more affected than males by a given dose of alcohol calculated on body weight. Females obtained a significantly higher peak blood alcohol level than males and also were more impaired than males on the delayed recall verbal memory task, even though both males and females were tested at comparable blood alcohol levels. No significant dif-

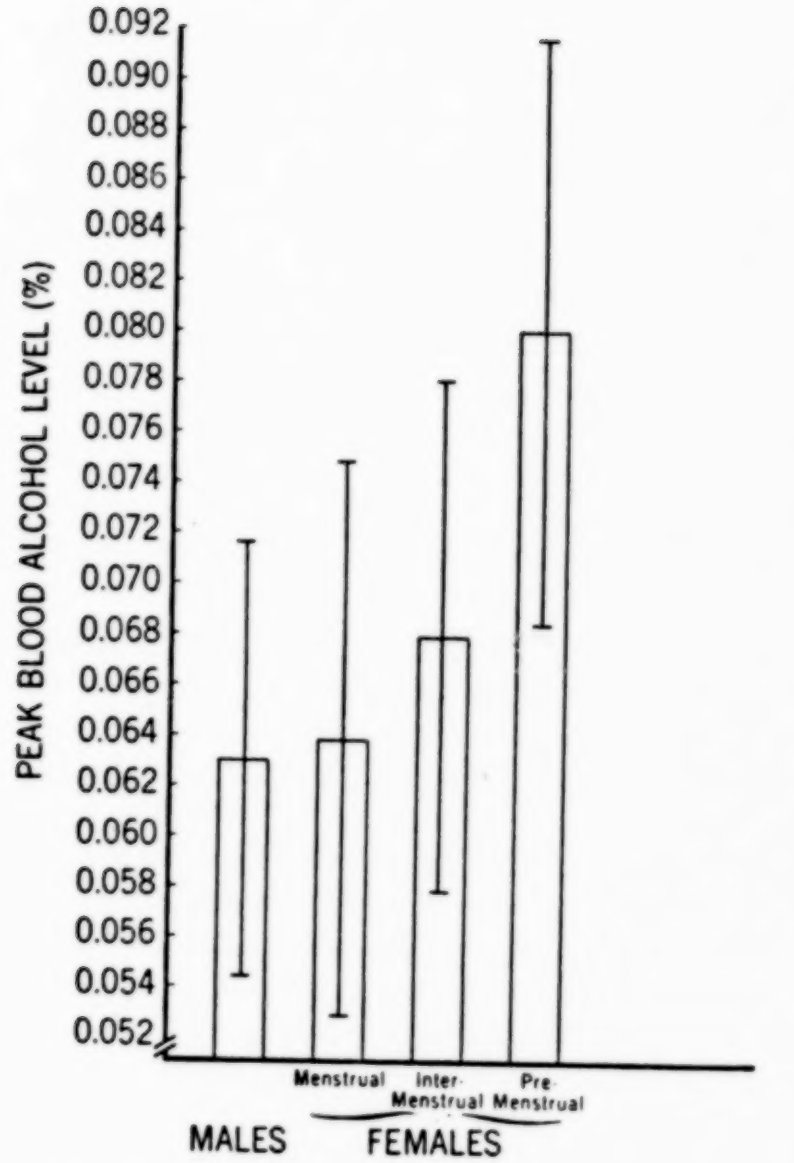

Figure 4. Mean peak blood alcohol levels for males and for females tested at different times in the menstrual cycle.

ferences were obtained for blood alcohol variables or performance between the females tested approximately on day 1 of day 14 of the menstrual period. However, a more detailed analysis revealed that those females who

[18] were actually tested during the pre-menstrual times (days 21 to 28) had significantly higher peak blood alcohol levels and faster absorption rates than females tested furing the menstrual or inter-menstrual period. However, there were no performance differences among females tested during different phases of the menstrual cycle. Females taking birth control pills were not significantly different from females not taking birth control pills for either blood alcohol variables or performance measures.

Direct support for the Broverman *et al* hypothesis was not found in this study in that males and females performed virtually identical on both an immediate and a delayed cognitive task before drinking alcohol. The finding that females were more impaired by alcohol than males on the delayed recall task but not on the immediate recall task suggests that tasks that require an inhibition of response may be more affected by alcohol than tasks that require an immediate response, this effect being greater for females than males.

Although a significant relationship was found between days of the menstrual cycle and blood alcohol variables, cognitive performance was not related to cyclic fluctuation in female hormones in normally menstruating women. These results are consistent with other reports that females do not show cognitive performance differences at different times in the menstrual cycle. Several factors may have been related to this failure to find a relationship of performance to time in the menstrual cycle. First, this memory task may not have been sensitive to the relatively small changes in hormonal levels and the accompanying physiological and psychological factors that most women experience. Second, a subject selection factor may have been involved in that only females who had few overt symptoms associated with the

[19] menstrual cycle volunteered for the study. This is supported by the data from the Menstrual Distress Questionnaire. Third, a *post hoc* analysis revealed that blood alcohol variables, but not performance, were influenced by alcohol differentially during the pre-menstrual time as opposed to other times in the cycle. This suggests that the decline or rate of decline of estrogen or progesterone or both may be more important than absolute levels (Somerville, 1972). Future research should be directed at investigating the separate phases of the menstrual cycle as well as determining the absolute and changing hormonal levels.

The finding of a higher peak blood alcohol level in females than in males provides direct empirical support for the theoretical formulation that females should obtain higher peak blood alcohol levels than males. However, the reason for this difference may not be as simple as previously supposed since a higher peak blood alcohol level was found only in females tested during the pre-menstrual time. Although other reports have indicated sex differences in blood alcohol variables, the time in the menstrual cycle was apparently not taken into consideration (Shumate, Crowther & Zarafshon, 1967). Future research employing male and female subjects should take these differences into consideration.

The results of the memory task are in agreement with previous reports that alcohol impairs immediate free recall more on the ascending than on the descending limb of the blood alcohol curve. A greater impairment of delayed recall as compared to immediate recall for all subjects is also consistent with previous reports (Jones, 1973). This difference was a result of words not being recalled from long-term storage, with recall of words from short-term [20] storage not being impaired. The alcohol effect on memory in this study at a

blood alcohol level of 0.04% is very similar to a previous study where subjects were tested at 0.08% (Jones, 1973). This suggests that memory is affected by relatively low doses of alcohol and shows little more impairment at higher doses. This is in contrast to animal studies where dose-response curves have been obtained during active and passive learning experiments (Holloway, 1972; Holloway and Wansley, 1973; Holloway and Vardiman, 1971).

Summary

Males and females were equally impaired by alcohol on an immediate recall memory task but females were more impaired than males on a delayed recall memory task. Females obtained significantly higher peak blood alcohol levels than males on the same dose of alcohol. Females tested during the pre-menstrual time of the cycle reached significantly higher peak blood alcohol levels than females tested at other times in the menstrual cycle. Memory was not affected differentially for females tested at different days in the menstrual cycle. It appears that males and females may respond differentially to the same dose of alcohol depending on the type of task employed and the day in the menstrual cycle in which females are tested.

These results suggest that females may become more intoxicated than males on the same alcohol dose as a function of sex hormonal levels as reflected by the day of the menstrual cycle. Future studies will be directed toward determining the levels of estrogen and progesterone as well as testosterone before and during alcohol intoxication to determine the relationship between blood alcohol variables, cognitive performance and sex hormone levels.

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[25] Acknowledgements

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ITEM 17 — PLAINTIFFS' EXHIBITS 3 AND 4 AND TRIAL BRIEF APPENDIX (EXTRACT)

1970 CENSUS OF POPULATION
GENERAL POPULATION CHARACTERISTICS
U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

° ° °

OKLAHOMA

° ° °

Table 20. Age by Race and Sex: 1970

° ° °

Male

Age	*Total*
° ° °	° ° °
18 years	24,095
19 years	22,955
20 years	22,638
° ° °	° ° °
[18, 19, 20 year olds	69,688]

° ° °

Female

Age	*Total*
° ° °	° ° °
18 years	23,522
19 years	22,732
20 years	22,253
° ° °	° ° °
[18, 19, 20 year olds	68,507]

° ° °

Table 24. Age by Race and Sex, for Areas and Places, 1970

Oklahoma City

Age	*Male*	*Female*
° ° °	° ° °	° ° °
18 years	2,822	3,196
19 years	2,455	3,119
20 years	2,357	3,282
° ° °	° ° °	° ° °
[18, 19, 20 year olds	7,634	9,597]

MINNESOTA

° ° °

Table 20. Age by Race and Sex: 1970

Male

Age	*Total*
° ° °	° ° °
18 years	36,323
19 years	30,934
20 years	27,432
° ° °	° ° °
[18, 19, 20 year olds	94,689]

Female

Age	*Total*
. . .	. . .
18 years	38,566
19 years	35,522
20 years	34,922
. . .	. . .
[18, 19, 20 year olds	109,010]

. . .

UNITED STATES

. . .

Table 50. Single Years of Age by Race and Sex: 1970

Age	*Male*	*Female*
. . .	. . .	. . .
18 years	1,893,207	1,872,895
19 years	1,762,471	1,797,746
20 years	1,680,817	1,809,713
. . .	. . .	. . .
[18, 19, 20 year olds	5,336,495	5,480,354]

. . .

. . . . . .

ITEM 18 — DEFENDANTS' EXHIBITS 1-5 (REFERENCE)

[It has been deemed by counsel that the extracts from the State's Exhibits 1-5 which the District Court appended to its published opinion herein, 399 F.Supp. at 1314-1321, and Jurisdictional Statement at A22-A31, sufficiently reflect those portions thereof relevant to the consideration of this Appeal.]

ITEM 19 — DEFENDANTS' EXHIBIT 6 (EXTRACT)

CRIME
IN THE UNITED STATES
1972
Issued by — Clarence M. Kelley, Director – FBI
UNIFORM CRIME REPORTS

[FBI Seal]

For Release
Wednesday PM, August 8, 1973
Printed Annually

[vi] Foreword

The crime information in the Uniform Crime Reporting publications which date back to the commencement of this Program in 1930 is a testimonial to the wisdom and progressive outlook of law enforcement administrators. The Uniform Crime Reporting Program is the product of a voluntary cooperative law enforcement effort to produce national crime statistics. Approximately 10,000 law enforcement agencies, covering 93 percent of the United States population, submit monthly and annual reports to the FBI so that information can be assembled to depict the current crime problem in the United States. National crime information would not be available for use by local, state, and Federal governments in planning and developing means of combatting the crime problem without the voluntary participation of law enforcement agencies.

Uniform Crime Reports is a practical Program in that each contributing law enforcement agency is responsible for submitting data in accordance with national crime definitions and standards. Much of the quality in

this Program is directly related to the degree of adherence to Uniform Crime Reporting standards. In order to improve the overall quality of the information collected in the Program, the FBI in 1967 began encouraging the development of state Uniform Crime Reporting Programs. Under this concept, states are encouraged to pass mandatory crime reporting laws and designate a state criminal justice agency to collect and verify submitted crime data. Currently 14 states are operating such programs. As part of this concept, the state agency needs to develop audit capability designed to ensure that each law enforcement agency is following the national standards.

Each state which develops a Uniform Crime Reporting Program has local and state information immediately available for planning, legislation, and disbursement of funds. Through the use of such information state governments can identify areas within the state criminal justice system that require additional resources. This enables the crime control effort to isolate and more effectively handle the problem.

The Law Enforcement Assistance Administration offers financial assistance to states in connection with the development and establishment of such crime reporting systems. As more and more states develop mandatory state systems, the overall quality of crime data will improve and the amount of information available for use by those concerned with the administration of criminal justice will increase.

Federal Bureau of Investigation.

[123]

Table 29. — Total Arrest Trends, 1967-72
[3,601 agencies; 1972 estimated population 125,240,000]

Offense charged	Number of persons arrested								
	Total all ages			Under 18 years of age			18 years of age and over		
	1967	1972	Percent change	1967	1972	Percent change	1967	1972	Percent change
• • •									
Driving under the influence	245,643	483,546	+96.8	2,511	5,983	+138.3	243,132	477,563	+96.4
Liquor laws	173,460	159,505	−8.0	53,715	59,312	+10.4	119,745	100,193	−16.3
Drunkenness	1,346,623	1,147,774	−14.8	30,726	33,857	+10.2	1,315,807	1,113,917	−15.3
• • •									

[129]

Table 34. — Total Arrests, Distribution by Sex, 1972
[6,195 agencies; 1972 estimated population 160,416,000]

Offense charged	Number of persons arrested			Percent male	Percent female	Percent of total		
	Total	Male	Female			Total	Male	Female
• • •								
Driving under the influence	604,291	562,859	41,432	93.1	6.9	8.6	9.5	3.9
Liquor laws	207,675	178,160	29,515	85.8	14.2	3.0	3.0	2.8
Drunkenness	1,384,735	1,284,677	100,058	92.8	7.2	19.7	21.6	9.5
• • •								

ITEM 20 — DEFENDANTS' EXHIBIT 7 (ENTIRE)

THE DRINKING DRIVER
AND THE DRINKING PEDESTRIAN
DURING 1971

Planning Section
Minnesota Department
of Public Safety
210 Highway Building
St. Paul, Mn. 55155

[1]

Part 1. Alcohol Laws in Traffic Safety

Minnesota Statutes, Chapter 169, provide for control of the use of liquor on the public roadways to prevent intoxicated persons from driving motor vehicles. Following is a summary of the laws prohibiting the use of alcohol while driving a motor vehicle and providing for a testing system for enforcement and statistical use:

The blood alcohol content of all fatally injured drivers and pedestrians 16 or older must be determined if the victim dies within four hours of the crash. Medical technicians or the Minnesota Bureau of Criminal Apprehension laboratory technicians usually perform these tests. This information is then used for statistical purposes by the Department of Public Safety.

There is also an alcohol-testing program for motor vehicle drivers suspected of being intoxicated while driving on a public road. It is a misdemeanor to operate a motor vehicle while under the influence of an alcoholic beverage or having 0.10 percent or more alcohol in the blood.

A preliminary screening test for intoxication is provided for by law, to guide a police officer in deciding whether an arrest should be made. If the officer "has reason to

believe from the manner in which a driver is driving . . . a vehicle" that the driver is intoxicated, he may require the driver to submit to this screening test, the results of which are not admissible in court. If the driver refuses to submit to the screening test, the officer may place him under arrest. After being arrested, or if he has just been involved in a motor vehicle crash resulting in property damage, personal injury or death, the driver is again asked to submit to a blood, breath or urine test. The results of this test are admissable evidence in court action.

If the driver refuses to allow the test after he is arrested, no test will be taken, but his license may be revoked for six months, under the "implied consent law." Although he later may be acquitted of any DWI charge, the revocation is still valid.

If a driver is convicted of driving while intoxicated, he is subject to a maximum fine of $300 or up to 90 days' imprisonment, or both, and his license will be revoked for at least 30 days. If, however, the violation results in "grievous" bodily injury or death to another person, the penalty is from 60 to 90 days' imprisonment and license revocation for at least 90 days.

In some cases, the convicted person may submit to medical treatment and his sentence will be stayed by the court.

[2] A subsequent DWI conviction within three years is punishable by 10 to 90 days' imprisonment and at least 90 days' license revocation.

If a driver has had three DWI convictions within three years, he will not be issued any type of driver license until a certification has been received that the person has been rehabilitated.

In 1971, over 81 percent of the fatally injured drivers and over 76 percent of the fatally injured pedestrians who tested alcohol positive were found to be legally intoxicated at the time of the crash. Almost 10,000 drivers were convicted of driving while intoxicated, and over 1,400 were convicted for a second DWI offense. Nationwide, about half the fatal motor vehicle crashes involve alcohol each year.

These statistics support the need for alcohol laws and their enforcement. The prime reason for these laws, and for the existence of the agencies which enforce them, is to preserve the safety of the public; obviously, safety is severely threatened when alcohol and driving are combined.

[3]

Part 2. The Drinking Driver

This report has been prepared by the Minnesota Department of Public Safety in accordance with Minnesota Statutes, Chapter 169.10. In 1968, legislation was enacted providing for an alcohol blood testing program handled by county coroners throughout the state. All drivers and pedestrians over 16 who die within four hours of a traffic crash are to be tested to determine their blood alcohol content.

In 1971, 59.8 percent of the fatally injured drivers tested were alcohol positive and 81.3% of the positive cases were at or above the .10% level of intoxication. Between the hours of 9 p.m. and 3 a.m., over 80 percent of the fatally injured drivers tested were alcohol positive. Males composed 91.0% of the alcohol positive cases and 16 to 24 year olds composed 48.4% of total alcohol positive cases.

This report is based on data printed in "Facts on Motor

Vehicle Crashes in Minnesota During 1971", but is more comprehensive and deals entirely with alcohol involvement in motor vehicle crashes. Data from the county coroner's testing program has been updated since the publication of the crash summary book, and now includes statistics on 259 drivers and 44 pedestrians who died in crashes and were tested for their blood alcohol levels.

[4]

TABLE 1
DRINKING DRIVER FACTS

1968	%	1969	%	1970	%	1971	%	
1,060		988		987		1,024		people were killed in motor vehicle crashes
531	49.6%	504	51.0%	488	49.5%	510	49.9%	drivers were killed
265	49.9%	270	53.5%	241	49.4%	259	50.8%	fatally injured drivers were tested for alcohol content (percent of all drivers killed)
144	54.3%	147	54.5	142	59.0%	155	59.8%	of those tested had alcohol in their system (called positive cases)
114	79.2%	122	82.9%	122	85.9%	126	81.3%	of the positive cases were at or above the 0.10% level of intoxication
131	91.0%	137	93.1%	136	95.8%	141	91.0%	of the positive cases were male
13	9.0%	10	6.9%	6	4.2%	14	9.0%	of the positive cases were female
37	32.5%	46	31.3%	42	29.5%	48	31.0%	of the positive cases which tested 0.10% or higher occurred between midnight and 3 a.m.
67	46.6%	63	42.9%	58	40.8%	75	48.4%	of the positive cases were between the ages of 16 and 24
56	49.1%	62	42.2%	49	34.5%	60	38.7%	of the positive cases which tested 0.10% or higher were in the 16-24 age range

[5]

TABLE 2
FATAL CRASHES INVOLVING DRINKING DRIVERS

TYPE OF CRASH	NUMBER	PERCENT
Multi-vehicle collision	63	40.6
Ran off the road	70	45.2
Collision with:		
parked vehicle	1	.6
fixed object	15	9.7
bicycle	1	.6
railroad train	4	2.7
Other non-collision (including overturned)	1	.6
Total	155	100.0

[6]

TABLE 3
DRIVER FATALITIES
by
Blood Alcohol Concentration and Road Classification

ROAD CLASS	TOTAL TESTED	TOTAL NEGATIVE	BLOOD ALCOHOL CONCENTRATION (PERCENT) .010-.049 M	.010-.049 F	.050-.099 M	.050-.099 F	.100-.149 M	.100-.149 F	.150-.249 M	.150-.249 F	.250-over M	.250-over F	TOTAL POSITIVE	PERCENT OF GROUP TESTING POSITIVE	PERCENT OF ALL POSITIVE CASES
INTERSTATE-rural	2	1							1				1	50.0	.6
INTERSTATE-urban	6	2	1		1						1	1	4	66.7	2.6
TRUNK HWY-rural	120	52	3		6	3	15	2	28	2	9		68	56.7	43.9
TRUNK HWY-urban	33	14	1	1			1		13		2	1	19	57.6	12.3
COUNTY ROAD	65	23	2		3	3	9		17		8		42	64.6	27.1
CITY STREET	25	9	1		2		1	1	8		3		16	64.0	10.3
TOWNSHIP ROAD	8	3	1		1		2				1		5	62.5	3.2
UNKNOWN	0	0											0	0.0	0.0
TOTAL	259	104	10		19		31		69		26		155	59.8	100.0

M = Male

F = Female

[7]

TABLE 4
DRIVER FATALITIES
by
Blood Alcohol Concentration and Age

AGE	TOTAL TESTED	TOTAL NEGATIVE	BLOOD ALCOHOL CONCENTRATION (PERCENT) .010-.049 M	.010-.049 F	.050-.099 M	.050-.099 F	.100-.149 M	.100-.149 F	.150-.249 M	.150-.249 F	.250-over M	.250-over F	TOTAL POSITIVE	PERCENT OF GROUP TESTING POSITIVE	PERCENT OF ALL POSITIVE CASES
0-20	58	24	3	1	2	2	8	1	13		3	1	34	58.6	21.9
21-24	58	16	2		4	1	11	2	17		5		42	72.4	27.1
25-29	23	5	2		1		2		7		5	1	18	78.3	11.6
30-34	15	6	1				1		6		1		9	60.0	5.8
35-39	15	8					1		2	1	3		7	46.7	4.5
40-44	18	8			1	1	1		2	1	4		10	55.6	6.6
45-49	16	5			2	1			7		1		11	68.8	7.0
50-54	6	2					1		1		2		4	66.7	2.6
55-59	10	5	1						4				5	50.0	3.2
60-64	12	6			1	1	1		3				6	50.0	3.9
65-up	28	19			2		2		5				9	32.1	5.8
TOTAL	259	104	10		19		31		69		26		155	59.8	100.0

M = Male

F = Female

[8]

TABLE 5
DRIVER FATALITIES
by
Blood Alcohol Concentration and Time

TIME	TOTAL TESTED	TOTAL NEGATIVE	BLOOD ALCOHOL CONCENTRATION (PERCENT) .010-.049 M	.010-.049 F	.050-.099 M	.050-.099 F	.100-.149 M	.100-.149 F	.150-.249 M	.150-.249 F	.250-over M	.250-over F	TOTAL POSITIVE	PERCENT OF GROUP TESTING POSITIVE	PERCENT OF ALL POSITIVE CASES
Mid-3am	64	8	1		5	2	13	2	24	1	7	1	56	87.5	36.1
3am-6am	19	3			1	1	5	1	6		2		16	84.2	10.3
6am-9am	23	20							2		1		3	13.0	1.9
9am-Noon	14	11							1		2		3	21.3	1.9
Noon-3pm	26	18			1		1		3		3		8	30.8	5.3
3pm-6pm	41	21	3		2	1	2		10		2		20	48.8	12.9
6pm-9pm	31	15	1		1		3		6	1	3	1	16	51.6	10.3
9pm-Mid	39	3	4		2	2	4		15		3		31	79.5	20.0
Unknown	2	0			1*						1*		2	100.0	1.3
Total	259	104	10		19		31		69		26		155	59.8	100.0

M = Male

F = Female

*Unknown sex

[9]

TABLE 6
DRIVER FATALITIES
by
Blood Alcohol Concentration and Month

MONTH	TOTAL TESTED	TOTAL NEGATIVE	BLOOD ALCOHOL CONCENTRATION (PERCENT) .010-.049 M	.010-.049 F	.050-.099 M	.050-.099 F	.100-.149 M	.100-.149 F	.150-.249 M	.150-.249 F	.250-over M	.250-over F	TOTAL POSITIVE	PERCENT OF GROUP TESTING POSITIVE	PERCENT OF ALL POSITIVE CASES
January	13	7			2	1	1		2				6	46.2	3.8
February	10	4			1		2		2		1		6	60.0	3.8
March	17	6			2	1			4		4		11	64.7	7.1
April	22	10	2				1		6		2	1	12	54.5	7.7
May	18	8	1				2		5		2		10	55.6	6.5
June	15	11					2	1			1		4	26.7	2.6
July	31	12	2		1	1	4		9		2		19	61.3	12.3
August	29	10			2		2		10	1	4		19	65.5	12.3
September	36	14	1		3	1	4	1	10	1	1		22	61.1	14.2
October	29	10	2	1		1	7		6		1	1	19	65.5	12.3
November	25	7			1	1	1		10		5		18	72.0	11.6
December	14	5	1		1		2	1	3		1		9	64.2	5.8
TOTAL	259	104	10		10		31		69		26		155	59.8	100.0

M = Male

F = Female

Part 3. Policing the Drinking Driver

The emphasis being placed on policing the drinking driver is shown by the increased number of convictions for driving while intoxicated in 1971. DWI convictions number 9,687, up 12.2 percent from 1970. Minnesota Highway Patrol DWI arrests alone increased 29.5 percent to 2,410 in 1971. Repeat DWI convictions were up to 1,915, which is 19.8 percent of the total DWI convictions for 1971.

Out of 4,301 analyses of specimens submitted to the Bureau of Criminal Apprehension laboratory by state and local police agencies, 4,135 (96 percent) were positive. Of the 4,135 positive cases, 3,856 (93 percent) were at or above the .10 percent blood alcohol level which is illegal when driving in Minnesota. A total of 3,387 subjects (82 percent) were at or above the .15 percent level, and 27 subjects were between .350 and .399 — levels dangerously close to lethal dosages.

This data indicates that the majority of drivers who are arrested for drinking while driving are at very high levels of intoxication and thus are severly impaired in their ability to operate a motor vehicle.

TABLE 1
DWI CONVICTIONS

1971	9,687
1970	8,634
1969	8,471
1968	7,431
1967	5,977
1966	5,792
1965	6,133
1964	6,307

TABLE 2
REVOCATIONS UNDER
THE IMPLIED CONSENT LAW*

1971	423
1970	855
1969	691
1968	166
1967	22
1966	22
1965	25
1964	17

*The decrease in revocations under the implied consent law is a result of a Minnesota Supreme Court ruling handed down on March 12, 1971. It decreed that a driver who refuses to take a chemical test cannot have his license revoked under the implied consent law if he pleads quilty to driving under the influence.

TABLE 3
REPEAT DWI CONVICTIONS

	1966	1967	1968	1969	1970	1971
Second offense	851	708	983	1,162	1,316	1,454
Third offense	197	200	228	276	351	370
Fourth offense	44	34	48	41	64	57
Fifth offense	11	7	7	10	22	23
Sixth offense	3	2	4	3	3	6
Seventh offense	0	0	0	0	3	1
Eighth offense	2	0	0	0	1	2
Ninth offense	2	1	0	0	0	1
Tenth offense	0	0	0	0	0	1
Total repeat convictions	1,110	952	1,270	1,492	1,760	1,915
Total DWI convictions	5,792	5,977	7,431	8,471	8,634	9,687
Percent repeat convictions	19.2	15.9	17.1	17.6	20.4	19.8

TABLE 4
HIGHWAY PATROL DWI ARRESTS AND CONVICTIONS

YEAR	NUMBER ARRESTS	NUMBER CONVICTIONS	PERCENT CONVICTIONS
1971	2,410	1,954	81.1
1970	1,860	1,510	81.2
1969	1,640	1,404	85.6
1968	1,535	1,342	87.4
1967	1,384	1,242	89.7
1966	1,225	1,164	95.0
1965	1,268	1,184	93.4
1964	1,270	1,211	95.4

TABLE 5
BLOOD ALCOHOL LEVELS IN DWI ARRESTS

Alcohol Level (percent)	1969	1970	1971
Negative (.000-.009)	137	151	166
.010-.049	114	86	52
.050-.099	178	176	229
.100-.149	559	612	469
.150-.199	1,154	1,343	1,653
.200-.249	878	905	1,063
.250-.299	327	293	570
.300-.349	52	54	74
.350-.399	10	12	27
TOTAL	3,409	3,632	4,301

(Data obtained from Bureau of Criminal Apprehension laboratory and refer to analysis of specimens submitted by local and state police agencies)

[13]

TABLE 6

BLOOD ALCOHOL LEVELS IN 1971 DWI ARRESTS

AGE	TOTAL TESTED	TOTAL NEGATIVE	TOTAL POSITIVE	BLOOD ALCOHOL CONCENTRATION(PERCENT) .010-.049	.050-.099	.100-.149	.150-.249	.250-over	% AGE GRP POS	% OF ALL POS CASES
Not Determined	639	30	609	8	42	79	382	98	95.5	14.7
15 and under	9	2	7	3	2		2		77.8	.2
16-20	475	48	427	16	68	89	245	9	89.9	10.4
21-24	656	15	641	11	47	98	440	45	98.0	15.5
25-34	772	15	757	7	27	73	534	116	97.7	18.1
35-44	608	17	591	2	8	47	381	153	97.3	14.4
45-54	617	12	605	2	15	38	389	161	98.2	14.6
55-64	370	11	359	2	10	23	255	69	97.1	8.7
65-over	155	16	139	1	10	22	88	18	89.6	3.4
TOTALS	4,301	166	4,135	52	229	469	2,716	669	96.3	100.0

NOTE: These data refer to analysis of chemical specimens submitted to the Bureau of Criminal Apprehension laboratory by state and local police agencies

[14]

Part 4. The Drinking Pedestrian

Motor vehicle crashes accounted for 157 pedestrian fatalities in 1971, an increase of 8 over the previous year. Of 44 pedestrians tested for blood alcohol content, 30 (68.2 percent) proved alcohol positive, and 23 of the 30 (76.7 percent) tested at or above the .10 percent level of intoxication.

Eighteen, or more than half, of the pedestrians who tested alcohol positive were killed on county roads or city streets. A third of the alcohol-positive fatalities, or 10, were 65 or older, and 5 were below the legal age for drinking. The hours between 9 p.m. and midnight were the most dangerous for the drinking pedestrian, with 12 alcohol-positive pedestrians killed during that period. Thirteen, or almost half, of the alcohol-positive pedestrian fatalities were killed in December and January; no drinking pedestrians were killed in May and June.

TABLE 1

DRINKING PEDESTRIAN FACTS

1968	%	1969	%	1970	%	1971	%	
122		114		149		157		pedestrians were killed in motor vehicle crashes*
46	37.7%	34	29.8%	41	27.5%	44	28.0%	fatally injured pedestrians were tested for alcohol content (percent of all pedestrians killed)
11	23.9%	17	50.0%	20	48.7%	30	68.2%	of those tested had alcohol in their system (called positive cases)
10	91.0%	15	88.1%	14	70.0%	23	76.7%	of the positive cases were at or above the 0.10% level of intoxication
4	36.4%	2	11.8%	3	15.0%	10	33.3%	of the positive cases were 65 or older

*Includes pedestrians killed in crashes in which striking the pedestrian was the second event.

[15]

TABLE 2
PEDESTRIAN FATALITIES
by
Blood Alcohol Concentration and Road Classification of Crash

ROAD CLASS	TOTAL TESTED	TOTAL NEGATIVE	BLOOD ALCOHOL CONCENTRATION (PERCENT) .010-.049 M	.010-.049 F	.050-.099 M	.050-.099 F	.100-.149 M	.100-.149 F	.150-.249 M	.150-.249 F	.250-over M	.250-over F	TOTAL POSITIVE	PERCENT OF GROUP TESTING POSITIVE	PERCENT OF ALL POSITIVE CASES
INTERSTATE-rural	1	1											0	0.0	0.0
INTERSTATE-urban	3	0							3				3	100.0	10.0
TRUNK HWY-rural	4	1			1	1			1				3	75.0	10.0
TRUNK HWY-urban	9	3					2		4				6	66.7	20.0
COUNTY ROAD	10	1	1		2		1		3		1	1	9	90.0	30.0
CITY STREET	17	8					1	1	2	1	4		9	52.9	30.0
TOWNSHIP ROAD	0	0											0	0.0	0.0
TOTAL	44	14	2		5		3		14		6		30	68.2	100.0

M = Male

F = Female

[16]

TABLE 3
PEDESTRIAN FATALITIES
by
Blood Alcohol Concentration and Age

AGE	TOTAL TESTED	TOTAL NEGATIVE	BLOOD ALCOHOL CONCENTRATION (PERCENT) .010-.049 M	.010-.049 F	.050-.099 M	.050-.099 F	.100-.149 M	.100-.149 F	.150-.249 M	.150-.249 F	.250-over M	.250-over F	TOTAL POSITIVE	PERCENT OF GROUP TESTING POSITIVE	PERCENT OF ALL POSITIVE CASE
0-20	9	4	1						3	1			5	55.6	16.7
21-24	2	1									1		1	50.0	3.3
25-29	1	1											0	0.0	0.0
30-34	1	1											0	0.0	0.0
35-39	0	0											0	0.0	0.0
40-44	2	0							1		1		2	100.0	6.8
45-49	4	1				1			1		1		3	75.0	10.0
50-54	5	1		1	1	1			1				4	80.0	13.3
55-59	2	1							1				1	50.0	3.3
60-64	4	0							3		1		4	100.0	13.3
65-up	14	4			2		2	1	3		2		10	71.4	33.3
TOTAL	44	14	2		5		3		14		6		30	68.2	100.0

M = Male

F - Female

[17]

TABLE 4
PEDESTRIAN FATALITIES
by
Blood Alcohol Concentration and Time of Crash

TIME	TOTAL TESTED	TOTAL NEGATIVE	BLOOD ALCOHOL CONCENTRATION (PERCENT) .010-.049 M	.010-.049 F	.050-.099 M	.050-.099 F	.100-.149 M	.100-.149 F	.150-.249 M	.150-.249 F	.250-over M	.250-over F	TOTAL POSITIVE	PERCENT OF GROUP TESTING POSITIVE	PERCENT OF ALL POSITIVE CASES
Mid-3am	8	2			1				4		1		6	75.0	20.0
3am-6am	1	1											0	0.0	0.0
6am-9am	0	0											0	0.0	0.0
9am-Noon	0	0											0	0.0	0.0
Noon-3pm	1	1											0	0.0	0.0
3pm-6pm	8	3				1		1	2			1	5	62.5	16.7
6pm-9pm	10	3	1	1	1		1		2		1		7	70.0	23.3
9pm-Mid	16	4			1	1	1		5	1	3		12	75.0	40.0
TOTAL	44	14	2		5		3		14		6		30	68.2	100.0

M = Male

F = Female

[18]

TABLE 5
PEDESTRIAN FATALITIES
by
Blood Alcohol Concentration and Month of Crash

MONTH	TOTAL TESTED	TOTAL NEGATIVE	BLOOD ALCOHOL CONCENTRATION (PERCENT) .010-.041 M	.010-.041 F	.050-.099 M	.050-.099 F	.100-.149 M	.100-.149 F	.150-.249 M	.150-.249 F	.250-over M	.250-over F	TOTAL POSITIVE	PERCENT OF GROUP TESTING POSITIVE	PERCENT OF ALL POSITIVE CASES
January	7	3						1	2		1		4	57.1	13.3
February	1	0	1										1	100.0	3.3
March	4	2							2				2	50.0	6.7
April	3	0					1				2		3	100.0	10.0
May	0	0											0	0.0	0.0
June	0	0											0	0.0	0.0
July	3	0			1		1				1		3	100.0	10.0
August	2	0			1				1				2	100.0	6.7
September	5	3							1	1			2	40.0	6.7
October	4	1		1		1			1				3	75.0	10.0
November	3	2							1				1	33.3	3.3
December	12	3			1	1			5		1	1	9	75.0	30.0
TOTAL	44	14	2		5		3		14		6		30	68.2	100.0

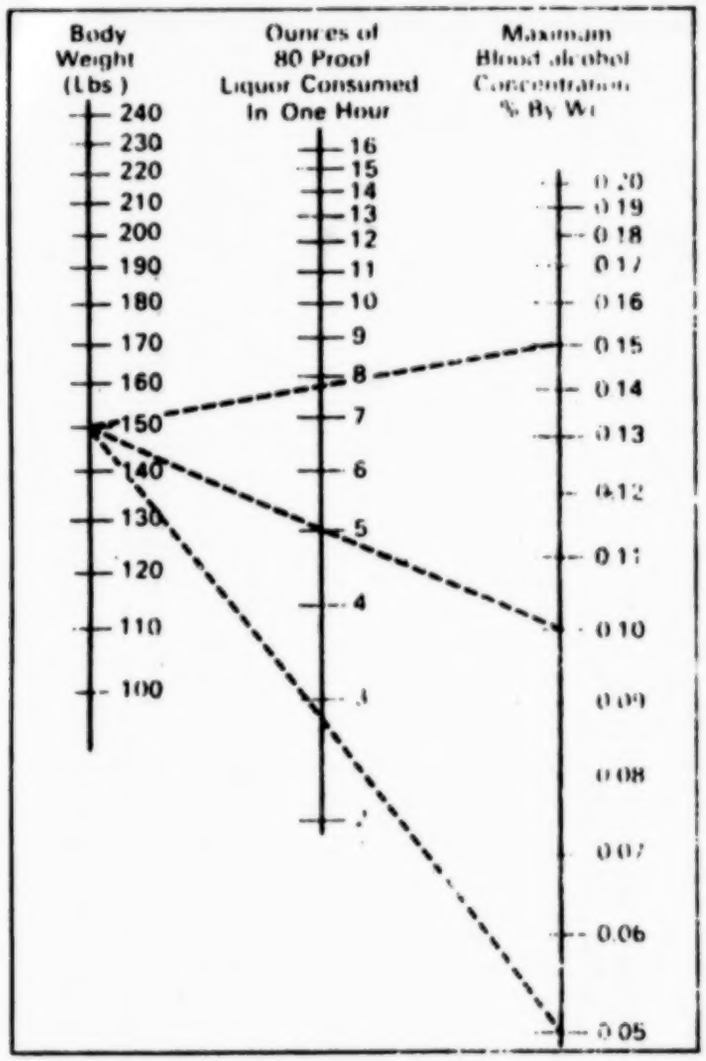
M = Male

F = Female

[19]

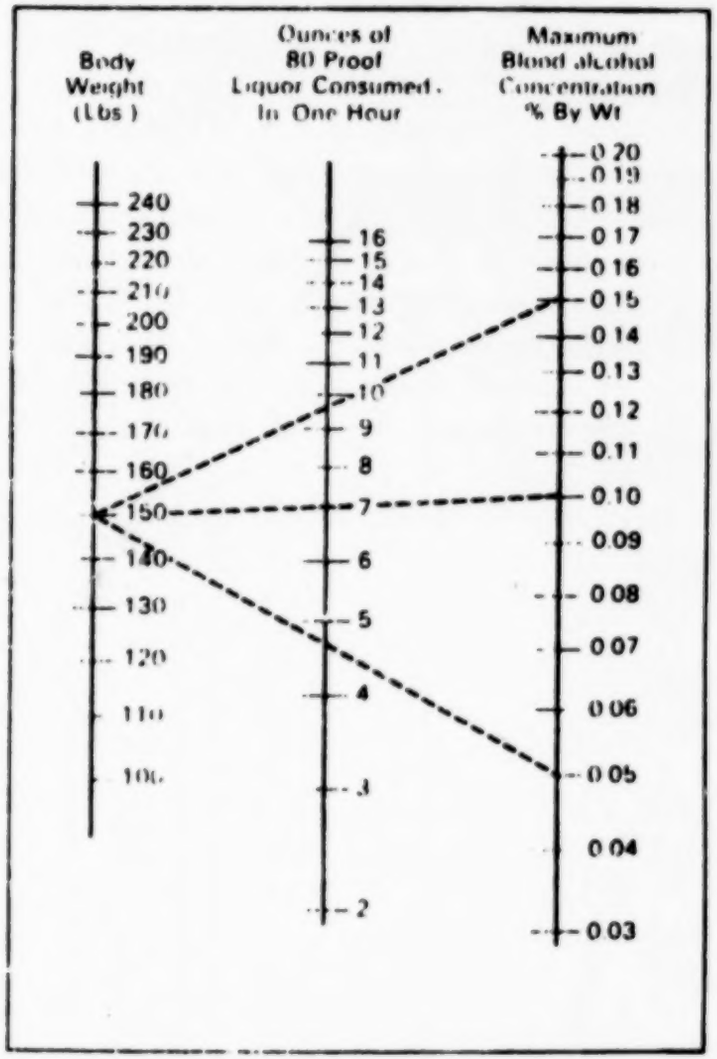
ESTIMATED AMOUNT OF 80 PROOF LIQUOR NEEDED TO REACH APPROXIMATE GIVEN LEVELS OF ALCOHOL IN THE BLOOD

"EMPTY STOMACH"
DURING A ONE-HOUR PERIOD* WITH LITTLE OR NO FOOD INTAKE PRIOR TO DRINKING



Adapted from a chart by U.S. Department of Health, Education and Welfare

"FULL STOMACH"
DURING A ONE HOUR PERIOD* OCCURRING BETWEEN ONE AND TWO HOURS AFTER AN AVERAGE MEAL



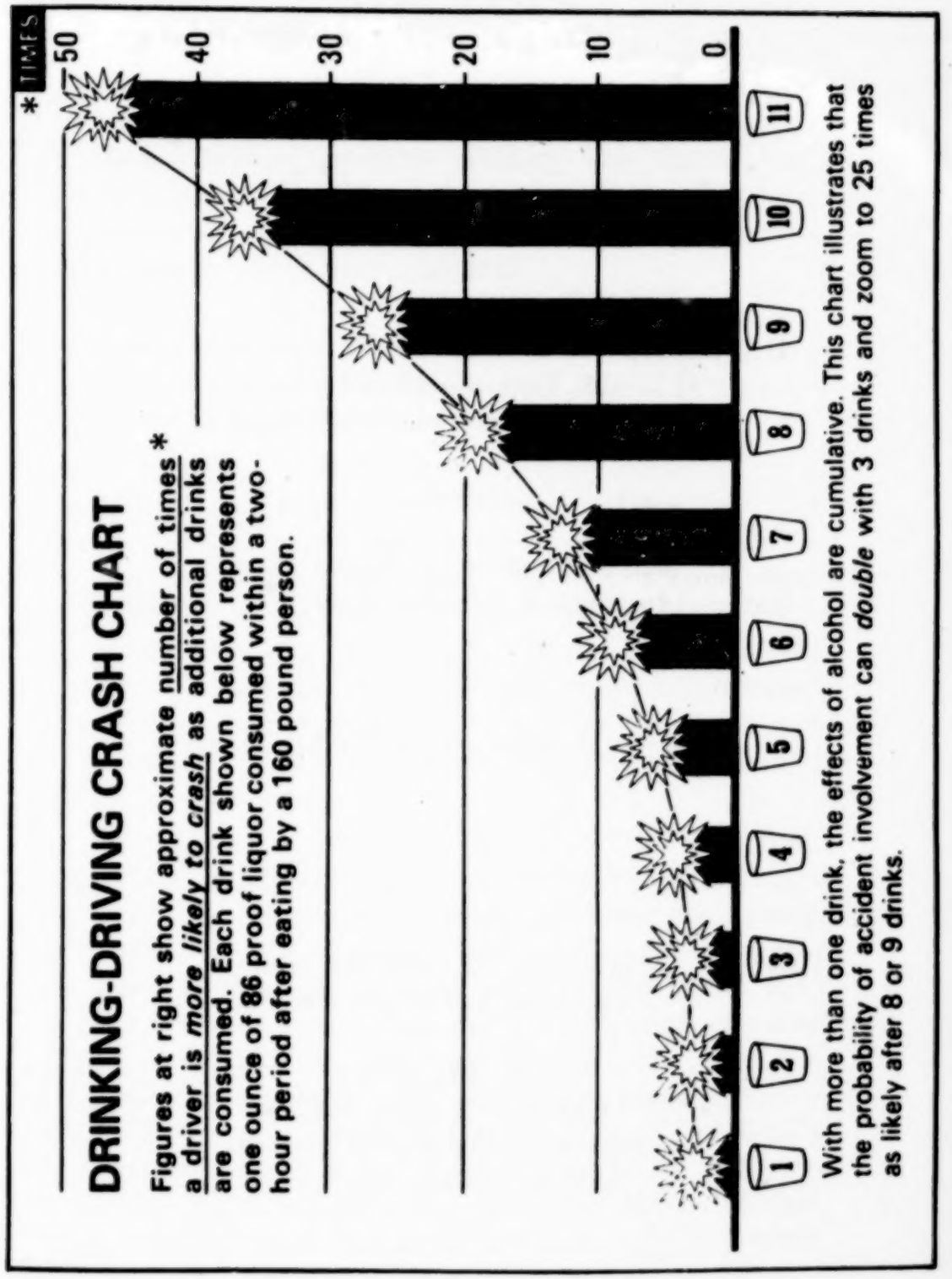
Adapted from a chart by Royal Canadian Mounted Police

*The rate of elimination of alcohol from the bloodstream is approximately 0.015% per hour. Therefore, subtract 0.015% from blood-alcohol concentration indicated on above charts for each hour after the start of drinking.

The examples above show the approximate *average* amount of 80 proof liquor a 150-pound person would have to consume in a one-hour period to reach 0.10%, the percentage-weight of alcohol in the bloodstream that is presumptive of intoxication.

To determine the approximate average number of ounces of 80 proof liquor needed in a one-hour period to reach 0.10%, draw a line from BODY WEIGHT to 0.10%. The line will intersect the average number of ounces needed to produce 0.10%. Follow the same procedure to determine the amount of liquor needed to reach other blood-alcohol concentrations, such as 0.05%, 0.15%, etc.

Charts show *rough averages only*. Many factors affect the rate of alcohol absorption into the bloodstream. Amount of food consumed, kind of food and drink consumed, and percentage of fatty tissue in the body, for examples, can vary blood-alcohol concentration values.



ITEM 21 — DEFENDANTS' EXHIBIT 8 (EXTRACT)

PROCEEDINGS OF THE JOINT CONFERENCE ON ALCOHOL ABUSE AND ALCOHOLISM

February 21-23, 1972

U.S. Department of Health, Education and Welfare
U.S. Department of Justice
U.S. Department of Transportation

National Institute of Mental Health
National Institute on Alcohol Abuse and Alcoholism

DHEW Publication No. (HSM) 73-9051

• • •

[109] **YOUTH, ALCOHOL, AND COLLISION-INVOLVEMENT**

Richard Zylam
Center of Alcohol Studies
Rutgers — The State University
New Brunswick, New Jersey

• • •

[110] Usage is more prevalent among urban youth than among rural and small-town youth.

There are strong religious and ethnic influences at work. A majority of Jews are users of beverage alcohol but indications of problem drinking are almost non-existent. Catholic youth and those who claim no religious affiliation are among the more frequent users, with a higher proportion of heavy drinkers.

• • •

[118]

Does Driving After Drinking Among Youthful Drivers Account For Their High Frequency of Collision-Involvement?

The Grand Rapids Study established the fact that elevated BAC's were the most important variable in collision-involvement and that age was second most important. That the young and the very old drivers have the poorest collision experience and middle-age drivers appear in collisions less often than would be expected has already been discussed. The question now arises as to whether that overinvolvement of youth is related to the use of alcohol.

In another earlier paper also based on data from the Grand Rapids Study, Zylam (64) stratified the data into eight 3-hour periods to re-examine the relationship of collision-involvement to alcohol and various demographic characteristics as they were related to the time of day. It was found that the frequency of elevated BAC's varied widely over time of day and so did the mixture of demographic variables. For example, between 3 a.m. and 6 a.m., 22 percent of the control had BAC's of 0.05 percent and higher, but between 9 a.m. and noon just 0.3% (three in every thousand) had BAC's in that range, and between 3 a.m. and 6 a.m. only 6 percent

of the control drivers were female as compared with 26 percent between noon and 3 p.m. These are just two examples of many such differences found.

These wide variations in the makeup of the driving population over time of day were reflected in the collision-involvement of every variable examined. In the post-midnight hours, even drivers with BAC's as high as 0.07 percent appeared in collisions less often than those who had nothing to drink, but in rush-hour traffic the very low BAC's appeared in collisions slightly more often than those who had nothing to drink. The collision-involvement of the different age groups also varied over time of day. It is [120] quite likely that those variations are dependent on such variables as the mix of demographic characteristics, density of traffic and experience in coping with traffic problems, purpose for driving, and the use or non-use of alcohol.

Table 4 shows the distribution of age groups among the control and collision drivers between 6 a.m. and 9 a.m. and the collision-involvement indices as derived from a chi-square analysis. Again it can be seen that the young and old drivers are overrepresented in the collision column. The 16- and 17-year old drivers appear in collision 75 percent more often than would be expected from their representation in the population-at-risk during that period, and the other age groups under 25 years also appeared in collisions substantially more often than expected. Is this overrepresentation related to the use of alcohol? The answer must be "no." Of 135 drivers under 25 years old in the control for that time period, just 4 — all of them older than 20 years — had been drinking, and among 132 drivers between 16 and 24 years old who were involved in collisions during that period, just 2 had been drinking. In fact, of 795 drivers

TABLE 3.

DISTRIBUTION OF AGE GROUPS AMONG THE CONTROL DRIVERS AND COLLISION-INVOLVED DRIVERS IN GRAND RAPIDS, WITH COLLISION-INVOLVEMENT INDICES

Age Groups		15-19	20-24	25-34	35-44	45-54	55-64	65-74	75-Older	Totals
Control group	N	689	950	1608	1682	1317	767	292	49	7354
	%	9.37	12.92	21.87	22.87	17.91	10.43	3.97	0.67	100.00
Collision group	N	1482	1612	1910	1708	1192	855	425	125	9309
	%	15.92	17.32	20.53	18.35	12.80	9.18	4.57	1.34	100.00
Totals	N	2171	2562	3518	3390	2509	1622	717	174	16663
	%	13.03	15.38	21.11	20.34	15.06	9.73	4.30	1.04	99.99
Collision involvement index[1]		+22.19	+12.63	-2.82	-9.81	-14.96	-5.64	+6.10	+28.59	

Sources: Previously unpublished data from Grand Rapids Study. $X^2 = 330.89$: d.f. 7; $p < .001$

1 See Table 2, Footnote 2.

TABLE 4.
DISTRIBUTION OF AGE GROUPS AMONG ALL TESTED CONTROL DRIVE AND ALL TESTED COLLISION-INVOLVED DRIVERS IN GRAND RAPIDS BETWEEN 6 A.M. AND 9 A.M., WITH COLLISION-INVOLVEMENT INDICES[1]

Age Groups		16-17	18-19	20-24	25-34	35-44	45-54	55-64	65-69	70-Older	Totals
Control group	N	8	38	89	178	176	182	97	19	8	795
	%	1.01	4.78	11.19	22.39	22.14	22.89	12.20	2.39	1.01	100.00
Collision group	N	17	40	75	116	111	70	53	14	7	503
	%	3.38	7.94	14.91	23.06	22.07	13.92	10.54	2.78	1.39	100.00
Totals	N	25	78	164	294	287	252	150	33	15	1298
	%	1.93	6.01	12.63	22.65	22.11	19.41	11.56	2.54	1.16	100.00
Collision involvement index[2]		+75.47	+32.33	+18.01	+1.82	-0.20	-28.32	-8.82	+9.48	+20.42	

Source: Data from Grand Rapids Study. $X^2 = 31.71$; d.f.8; $p < .001$

1. Cases in which the driver may have refused to cooperate, or in which a collision-involved driver was not tested, or in which the breath specimen was lost through mechanical failure are not included in these data; hence, the term "tested."

2. See Table 2, Footnote 2.

of all ages in the control during that period, just 8 had BAC's of 0.05 percent and higher, and of 503 drivers involved in collisions, just 10 were in that range. When all drivers with positive BAC's were deleted from the data and the chi-square analysis repeated, the resulting collision-involvement indices were almost identical to those shown in Table 4; if anything, the young and old drivers showed up slightly worse. This similarity in results, with both tests showing very high-collision-involvement rates for the very young driver is probably achieved because there were very few drinkers on the streets at that time and, without the modifying effects of alcohol, the problems related to youth and driving experience overshadowed the effects of alcohol and other variables.

A similar series of tests was run for each 3-hour period of the day but for the sake of brevity, only the period between 9 p.m. and midnight will be discussed. These are leisure hours when more drinking can be expected and when much driving is done for recreational purposes; it is reasonable to assume that the two activities might be combined by some drivers. Tables 5 and 6 show the distribution of BAC's among the various age groups in the control and collision groups for the period 9 p.m. to midnight, and it can be seen that there is a good deal of driving-after-drinking going on — even among young drivers.

If younger drivers were involved in more collisions than older drivers because of the excessive use of alcohol, it would be expected that: (a) young drivers would show a higher frequency of driving-after-drinking [124] than older drivers; and (b) that young drivers would have a worse collision-involvement index among all drivers, whether they had been drinking or not, than among alcohol-free drivers. A comparison of Tables 7

TABLE 5.
DISTRIBUTION OF BAC'S BY AGE GROUP AMONG CONTROL DRIVERS BETWEEN 9 P.M. AND MIDNIGHT
Blood Alcohol Concentration

Age Groups		0.00	0.01 0.04	0.05 0.07	0.08 0.10	0.11 0.14	0.15 Over	Totals	%
16-17	N	37						37	4.95
	%	100.0						100.00	
18-19	N	81	4	1				86	11.50
	%	94.19	4.65	1.16				100.00	
20-24	N	132	19	3		2		156	20.86
	%	84.62	12.18	1.92		1.28		100.00	
25-34	N	129	30	6	2			167	22.33
	%	77.25	17.96	3.59	1.20			100.00	
35-44	N	105	18	5	3	4	2	137	18.32
	%	76.64	13.14	3.65	2.19	2.92	1.46	100.00	
45-54	N	79	15	2	1	1	2	100	13.37
	%	79.00	15.00	2.00	1.00	1.00	2.00	100.00	
55-64	N	41	6	1	1	1		50	6.68
	%	82.00	12.00	2.00	2.00	2.00		100.00	
65-69	N	8	1					9	1.20
	%	88.89	11.11					100.00	
70-over	N	6						6	0.80
	%	100.00						100.00	
Totals	N	618	93	18	7	8	4	748	100.00
	%	82.62	12.43	2.41	0.94	1.07	0.53	100.00	

Source: Data from Grand Rapids Study.

and 8 shows that this is not true. In the absence of alcohol, age is an even more important predictor of collision-involvement. This happens because the higher BAC's are concentrated among the middle-age or "best" driving groups, and it can be assumed that those high

TABLE 6.
DISTRIBUTION OF BAC'S BY AGE GROUP AMONG COLLISION-INVOLVED DRIVERS BETWEEN 9 A.M. AND MIDNIGHT
Blood Alcohol Concentration

Age Groups		0.00	0.01 0.04	0.05 0.07	0.08 0 10	0.11 0.14	0.15 over	Totals	%
16-17	N	69	2					71	10.96
	%	97.18	2.82					100.00	
18-19	N	92	8	1	1	2	2	106	16.36
	%	86.79	7.55	0.94	0.94	1.89	1.89	100.00	
20-24	N	99	15	2	5	5	8	134	20.68
	%	73.88	11.19	1.49	3.73	3.73	5.97	99.99	
25-34	N	68	23	7	10	11	10	129	19.91
	%	52.71	17.83	5.43	7.75	8.53	7.75	100.00	
35-44	N	35	9	9	3	8	9	73	11.27
	%	47.95	12.33	12.33	4.11	10.96	12.33	100.01	
45-54	N	34	8	3	5	3	7	60	9.26
	%	56.67	13.33	5.00	8.33	5.00	11.67	100.00	
55-64	N	38	3	5	1	3	2	52	8.02
	%	73.08	5.77	9.62	1.92	5.77	3.85	100.01	
65-69	N	8					1	9	1.39
	%	88.89					11.11	100.00	
70-over	N	12			1		1	14	2.16
	%	85.71			7.14		7.14	99.99	
Totals	N	455	68	27	26	32	40	648	100.01
	%	70.22	10.49	4.17	4.01	4.94	6.17	100.00	

Source: Data from Grand Rapids Study.

BAC's are accompanied by some impairment. When the positive BAC's are removed from the data the impaired drivers are also removed, so the "best" age groups become better and the "worst" age groups show up relatively worse. It must be concluded that characteristics

related to age are more important to the collision-involvement of youth and old age than alcohol.[1]

Are Youthful Drivers More Likely To Be Involved In Collisions At Lower BAC's Than Older Or More Experienced Drivers?

Because age seems to be a stronger factor than alcohol in the collision-involvement of youth, it does not follow that alcohol can be ruled out as a causal factor in some youthful collisions. Tables 5 and 6 show that some of the youthful Grand Rapids drivers had been drinking and that the positive BAC's are more frequent among the collision-involved drivers than in the control group. Hyman (48) examined the collision-vulnerability and BAC's in the Grand Rapids Study by demographic characteristics and found that young drivers are more likely to be involved in collisions at low BAC's than older drivers. Table 9 presents his calculations by age, sex, and BAC. It can be seen that young drivers (and old drivers) especially males, have a higher vulnerability ratio than intermediate age groups at each BAC and that the different between age groups increases at each level of BAC. For male drivers under 18, who already had the highest vulnerability ratio at 0.00 BAC, the ratio increased three-fold even at the one-or-two drink level. There was not sufficient data to carry the test further for that age group. For the males 18 to 19 years old the collision-vulnerability ration increased from 1.55 at 0.00 percent BAC to 2.29 at 0.01-0.04 percent, and 4.17 at the 0.05-

[1]It is worth noting that, given this method of analysis, older drivers have a collision experience as bad or worse than that of young drivers and that their involvement index is much worse during hours of darkness than in daylight (Tables 4-8). This suggests the need for more study of the gerontological changes that may affect the operation of motor vehicles.

0.09 percent BAC level. The vulnerability ratio for 20 to 24 year old males was the same (1.12) at both the 0.00 percent level and at the 0.01-0.04 percent level, but increased to 1.78 at 0.05-0.09 percent and 9.38 at 0.10 percent BAC and higher, and the ratio for drivers between 35 and 64 years old was lower at BAC 0.05-0.09 percent than for drivers under 20 who had nothing to drink. This seems to reconfirm the earlier statement by Zylam (67) and laboratory work by Carpenter *et al.* (68), that experienced drinkers, who are also quite likely experienced drivers, can indulge in small amounts of alcohol and still perform better than the less proficient drivers who had nothing to [128] drink. This could be true even though they may have deteriorated from their pre-drinking proficiency.[1]

Drivers over 69 years old have a vulnerability ratio very similar to that of teenagers, although probably for very different reasons.

Is There A Stronger Relationship Between Youthful Drinking and Fatal Crashes Than Between Youthful Drinking and "All" Collisions?

The most recent studies of fatal crashes show that a disproportionate number of them involved drivers under 25. It is often stated that many of those younger drivers, especially those between 20 and 25 years old, had engaged in heavy drinking prior to their fatal trip. Although even one such case might be judged too many, younger drivers killed in crashes actually show lower frequencies of alcohol-involvement than do those 5, 10,

[1]This indicates that the widely used curve from the Grand Rapids Study showing the probability of causing a collision at various BAC's cannot be applied indiscriminately to every age group. (67)

TABLE 7.
DISTRIBUTION OF AGE GROUPS AMONG ALL TESTED CONTROL DRIVERS AND ALL TESTED COLLISION-INVOLVED DRIVERS IN GRAND RAPIDS BETWEEN 9 P.M. AND MIDNIGHT, WITH COLLISION-INVOLVEMENT INDICES[1]

Age Groups		16-17	18-19	20-24	25-34	35-44	45-54	55-64	65-69	70-over	Totals
Control group	N	37	86	156	167	137	100	50	9	6	748
	%	4.95	11.50	20.86	22.33	18.32	13.37	6.68	1.20	0.80	100.01
Collision group	N	71	106	134	129	73	60	52	9	14	648
	%	10.96	16.36	20.68	19.91	11.27	9.26	8.02	1.39	2.16	100.01
Totals	N	108	192	290	296	210	160	102	18	20	1396
	%	7.74	13.75	20.77	21.20	15.04	11.46	7.31	1.29	1.43	99.99
Collision involvement index[2]		+41.62	+18.94	-0.46	-6.11	-25.11	-19.21	+9.83	+7.72	+50.80	

1 See Table 4, Footnote 1.

2 See Table 2, Footnote 2.

Source: Data from Grand Rapids Study.

$x^2 = 45.15$; d.f. 8; $p. < .001$

TABLE 8.
DISTRIBUTION OF AGE GROUPS AMONG ALCOHOL-FREE CONTROL DRIVERS AND ALCOHOL-FREE COLLISION-INVOLVED DRIVERS IN GRAND RAPIDS BETWEEN 9 P.M. AND MIDNIGHT, WITH COLLISION-INVOLVEMENT INDICES

Age Groups		16-17	18-19	20-24	25-34	35-44	45-54	55-64	65-69	70-over	Totals
Control group	N	37	81	132	129	105	79	41	8	6	618
	%	5.99	13.11	21.36	20.87	16.99	12.78	6.63	1.29	0.97	99.99
Collision group	N	69	92	99	68	35	34	38	8	12	455
	%	15.16	20.22	21.76	14.95	7.69	7.48	8.35	1.76	2.64	100.01
Totals	N	106	173	231	197	140	113	79	16	18	1073
	%	9.88	16.12	21.53	18.36	13.05	10.53	7.36	1.49	1.68	100.00
Collision-involvement index[1]		+53.51	+25.41	+1.07	-18.60	-41.04	-29.04	+13.43	+17.91	+57.21	

Source: Data from Grand Rapids Study.

$x^2 = 65.75$; d.f. 8; $p. < .001$

1 See Table 2, Footnote 2.

TABLE 9.
PERCENTAGES OF ACCIDENT-INVOLVED DRIVERS (A) AND OF CONTROL DRIVERS (C), AND ACCIDENT-VULNERABILITY RATIOS (A-VR), IN EACH AGE-SEX-BAC CATEGORY

	Blood Alcohol Concentration											
	0.00%			0.01%–0.04%			0.05%–0.09%			0.10%+		
	A	C	A-VR	A	C	A-VR	A	C	A-VR	A	C	A-VR
Sex[a]												
Men	63.3	69.3	0.91	5.8	6.8	0.85	3.2	2.2	1.45	5.5	0.8	6.88
Women	20.1	19.7	1.02	1.0	1.0	1.00	0.3	0.2	1.50	0.8	0.0	c
Age[b]												
Men												
<18	4.86	2.04	2.38	0.22	0.03	7.33	0.05	0.00	c	0.02	0.00	c
18–19	7.35	4.75	1.55	0.48	0.21	2.29	0.25	0.06	4.17	0.13	0.00	c
20–24	11.11	9.29	1.12	1.05	0.94	1.12	0.48	0.27	1.78	0.75	0.08	9.38
25–34	12.23	15.10	0.81	1.49	1.59	0.94	0.90	0.56	1.61	1.62	0.24	6.75
35–44	10.25	15.00	0.68	1.10	1.54	0.71	0.67	0.59	1.14	1.50	0.27	5.56
45–54	7.44	11.75	0.63	0.84	1.47	0.57	0.40	0.44	0.91	0.72	0.16	4.50
55–64	5.75	7.56	0.76	0.35	0.63	0.56	0.28	0.24	1.17	0.62	0.04	15.00
65–69	1.74	2.10	0.83	0.15	0.27	0.56	0.08	0.06	1.25	0.13	0.01	13.00
70–74	1.47	0.78	1.88	0.10	0.04	2.50	0.07	0.03	2.33	0.05	0.00	c
75+	1.05	0.56	1.88	0.05	0.01	5.00	0.00	0.00		0.00	0.00	
Women												
<18	1.22	0.71	1.72	0.03	0.01	3.00	0.00	0.00		0.00	0.00	
18–19	1.81	1.56	1.16	0.05	0.06	0.83	0.02	0.01	2.00	0.05	0.00	c
20–24	3.56	2.38	1.50	0.22	0.10	2.20	0.03	0.04	0.75	0.03	0.00	c
25–34	3.49	4.16	0.84	0.20	0.24	0.83	0.08	0.07	1.14	0.20	0.00	c
35–44	4.34	5.03	0.86	0.23	0.30	0.77	0.12	0.06	2.00	0.25	0.00	c
45–54	2.76	3.71	0.74	0.13	0.18	0.72	0.07	0.03	2.33	0.07	0.00	c
55–64	1.92	1.82	1.05	0.07	0.08	0.88	0.00	0.01	0.00	.13	0.00	c
65–69	0.42	0.44	0.95	0.02	0.01	2.00	0.00	0.00	c	.02	0.00	c
70–74	0.32	0.17	1.88	0.02	0.00	c	0.00	0.00		.00	0.00	
75+	0.28	0.08	3.50	0.00	0.01	c	0.00	0.00		.00	0.00	

Source: Reproduced with permission from Quart. J. Stud. Alc., Suppl. No. 4, 1968.,p. 39.

a Total sex and BAC reported: 5988 accident-involved and 7529 control drivers.
b Total sex, age and BAC reported: 5983 accident-involved and 7092 control drivers.
c The ratio cannot be calculated since there are no controls.

and even 20 years their seniors. In Wayne County, Michigan (46) 11 percent of the drivers killed were under 20 years old, of whom 29 percent had BAC's of 0.10 percent or more; while for drivers from 20 to 25 years old (who represented 25 percent of all the driver fatalities), 63 percent had BAC's of 0.10 percent or higher. This compares with drivers from 26 to 35 years old who were killed, among whom 81 percent were at 0.10 percent BAC or higher and those from 36 to 45 years, among whom 73 percent were at that level.[2] Other studies also show low frequencies of high BAC's among young drivers as compared with middle-age drivers.

Initially, it must be recognized that a considerable portion of the overinvolvement of young drivers in fatal crashes may be explained by the greater exposure as described in previous pages. For example, in the Wayne County study the point is made that drivers between 16 and 25 years old comprised 36 percent of the fatalities but only 21 percent of the licensed population as represented in the Michigan Driver Profile (53). The figures relating to driver licenses here are derived from a random sample of the Michigan driver license files and do not allow for exposure. Supposing it were possible to determine the age distribution of all drivers using the highways at the times and places where those

---

[2]Regarding these data, Filkins et. al. said "it is now known that the alcohol involvement of the younger crash-involved fatalities is less than that of their older fatality counterparts. Young people are more often involved in crashes, whether it be due to driving inexperience, drinking inexperience, or a combination of the two conditions perhaps exacerbated by more reckless attitudes about driving." (46)

Wayne County fatal crashes occurred and it was learned that 30 percent of the drivers are under 25 rather than the 21 percent as shown in the driver license files; then the [129] overinvolvement of this age group would be reduced by more than 70 percent. If it were found that 36 percent of the drivers on the highways at the times and places of fatal crashes were in that age group,[1] then there would be no overinvolvement of drivers under 25; they will have appeared in collisions in direct proportion to their representation in the driving population.[2] This point must be made because failure to allow for exposure inflates the problem of traffic deaths as it relates to youth. This may be a major source of the alarm over youth involvement in fatal crashes.

It is difficult to reconcile the figures found in studies of fatal crashes with the information presented earlier regarding youthful drinking, youthful driving-after-drinking, and youthful involvement in "all" collisions after drinking. It cannot be said that the large number of alcohol-related fatal crashes involving youth reflect orgy-like drinking on the part of a major segment of the

[1]In Washtenaw County, adjacent to Wayne County, the survey of drivers in the nighttime traffic showed that more than 48 percent of them were 16 to 25 years old. However, this is probably an unusual situation because two large Universities are located in the sample area. (42)

[2]In the only bonafide controlled study of fatal crashes that appears in the literature, McCarroll and Haddon (55) reported "The case subjects were suggestively *older* [emphasis theirs] in both responsible and questionably responsible groups. However, the differences were not statistically significant. As a result, no age adjustment has been made in the case-control comparisons which follow."

young driver population; nor can it be said that large numbers of young drivers are driving after drinking huge quantities of beverage alcohol. It is more likely that those who are involved in fatal crashes while intoxicated are a typical group, a small group with characteristics that set them apart from the majority of young drivers. A number of studies have already identified such unique characteristics among drivers involved in fatal crashes after heavy drinking as well as among those convicted of driving while intoxicated or impaired, or who are just "bad drivers" (40, 44, 45, 47, 48, 52, 56-63). There is an urgent need to synthesize the studies from the fields of sociology, psychiatry, psychology, education, and other disciplines regarding the problem driver, with the work done in what is generally called the alcohol problem field. Much is known in that field about the etiology of "problem people" which would logically be applicable to the traffic field; however, it is not being used. Knowledge about cultural and religious influences, socioeconomic status, parental practices and family relationships, peer-group pressures and sex identification as they are reflected in drinking practices and attitudes toward drinking must be applied to the alcohol-involved traffic problems field so that this small but tragically important group of problem drinker-drivers can be identified at an earlier age — when major difficulty may still be prevented.

[130]

SUMMARY AND CONCLUSIONS

A survey of the literature reveals that, while there is great national concern about something called "alcohol and youth," there is little in objective studies to show that excessive drinking (or its usual disapproved accompanying behaviors) is even as frequent in this age cate-

gory as in any of the succeeding 5-year age brackets. In fact, the extent of such problems is markedly less among those usually labeled as youth or teenagers. Many teenagers drink, and by the age of 18 or 19 a majority use beverage alcohol at least occasionally. It is well established that youthful drinking reflects the attitudes and practices of their parents and the influence of cultural and religious backgrounds. Drinking among youth, like drinking among adults, is a societal function and, as among adults, a small minority drink intemperately. This minority frequently engages in other antisocial behavior as well. There is no evidence that the antisocial behavior is caused by alcohol alone. Rather, it is believed that both forms of aberrant behavior reflect the same or similar underlying character or personality problems and the same or similar stressful situations.

The practice of driving after drinking by young people is not as widespread as generally believed. Under the age of 18, driving after drinking is quite rare However, the frequency and intensity of driving after drinking increases rapidly for drivers 18 and 19 years old and the practice for those who are 20 to 25 years old resembles those who are older than 25. The heaviest frequency and greatest intensity, however, occur in various age groups between 25 and 54, depending on which studies are considered.

Young drivers are involved in disproportionate numbers of collisions. However, when allowances are made for exposure by comparing collision-involved drivers with drivers using the highways at the times and places of collision occurrences, rather than with the driver license files, their reported overinvolvement is cut by half. At the same time, using this measurement, the collision-involvement index for drivers over 69 years old is increased several fold. Drivers between 25 and 69

appear in collisions less often than would be expected on the basis of the population-at-risk. Collision-involvement indices also vary widely over the time of day.

Young drivers are not involved in more collisions than older drivers because of the use of alcohol. If that were the case, one would expect to find that young drivers drive more often after drinking than older drivers, and that the collision-involvement index for young drivers would be worse when drinking and nondrinking drivers were considered together than when nondrinkers were considered separately. Neither hypothesis is true. A greater number and proportion of drivers between 25 and 69 is found at every BAC above 0.00 percent. When the age distributions are examined by chi-square, the collision-involvement indices for both the very young and very old drivers are worse when just the nondrinkers are considered than when all drivers are included.

[131] In spite of the less significant role of alcohol in highway crashes involving youth, there is an important relationship of alcohol to youth-involvement in collisions which sharply differentiates them from the other age categories up to age 69. This concerns the impact of small amounts of alcohol; i.e., those resulting in BAC's which are positive but less than 0.05 percent. Among teenagers such low concentrations are an important component in crashes, whereas in all other groups up to age 69 such concentrations are of no significance at all. There is evidence that drivers under 18, who already have the worst collision-vulnerability ratio with nothing to drink, increase that vulnerability threefold after just one or two drinks. At that level (0.01-0.04 percent BAC) all age groups between 25 and 69 appeared in collisions less often than in the control.

Drivers under 25 years old appear to be involved in disproportionate numbers of fatal crashes. However,

whether or not that disproportion is attributable to the heavy use of alcohol is open to question on at least three points: (a) if allowances were made for exposure, the overinvolvement of young drivers would quite likely be reduced substantially; (b) some of the deaths among young drivers probably occur after light to moderate drinking — the kind of drinking that would not have lead to a fatal crash if the driver had been more experienced in either drinking or driving or both; (c) it seems plausible that at least a portion of the youthful fatalities might be attributable to problems associated with youth and inexperience rather than alcohol.

Finally, we cannot blithely explain away a major part of the fatal crash problem among youth and dismiss the remainder as "expected." The fact remains that thousands of young drivers die each year and a substantial number of these unnecessary deaths are related to some use of alcohol. The implication of this paper is that we must put the various sub-problems in their proper perspective before we can make a rational attack on the whole problem. There is a need to apply the knowledge and skills of the alcohol problems field to the alcohol-traffic problem. This would allow both identification of problem people at an earlier age and, hopefully, also prevention of problem drivers. It would also allow identification of problem types of drinking (clearly different for young as compared with older persons) and allow attack on this aspect of unnecessary death and injury on the highways.

ITEM 22 — DECISION (MEMORANDUM OPINION) (REFERENCE)

[The decision (Memorandum Opinion) of the District Court herein appealed is reported at 399 F.Supp. 1304, and is reproduced at Appendix A to the Jurisdictional Statement herein.]

ITEM 23 — JUDGMENT (REFERENCE)

[The formal Judgment herein, entered on May 17, 1975, is unreported, but is reproduced at Appendix B to the Jurisdictional Statement herein.]

CERTIFICATE OF SERVICE

I, Frederick P. Gilbert, a member of the Bar of this Honorable Court and counsel of record for the Appellants herein, do hereby certify that I served three copies of this Appendix upon counsel for all Appellees herein, to wit: upon the Hon. Larry Derryberry, Attorney General of the State of Oklahoma, by mailing the same to him at his office in the State Capitol Building, Oklahoma City, Oklahoma, Attn: Mr. James Gray, Assistant Attorney General, this _____ day of February, 1976, with first class postage thereon fully prepaid.

All Parties required to be served have been served.

FREDERICK P. GILBERT
Attorney for Appellants

Supreme Court, U. S.
FILED
DEC 10 1975
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-628

CURTIS CRAIG and CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Appellants,

VERSUS

HONORABLE DAVID BOREN, Governor, State of Oklahoma, HONORABLE LARRY DERRYBERRY, Attorney General, State of Oklahoma, HONORABLE D. M. BERRY, Chairman, HONORABLE LAWTON L. LEININGER, Vice-Chairman, HONORABLE J. L. MERRILL, Secretary-Member, Oklahoma Tax Commission, HONORABLE RAY WALL, Presiding Judge, Ninth Judicial District Court, State of Oklahoma, HONORABLE CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma, HONORABLE ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma, HONORABLE FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma, and HONORABLE HILARY DRIGGS, Chief of Police, Stillwater, Oklahoma,
Appellees.

MOTION TO AFFIRM

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December, 1975

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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Appellees.

MOTION TO AFFIRM

Come now the appellees, Honorable David Boren, Governor, State of Oklahoma; Honorable Larry Derryberry, Attorney General, State of Oklahoma; Honorable D. M. Berry, Chairman; Honorable Lawton L. Leininger, Vice-Chairman; Honorable J. L. Merrill, Secretary-Member,

Oklahoma Tax Commission; Honorable Ray Wall, Presiding Judge, Ninth Judicial District Court, State of Oklahoma; Honorable Charles H. Headrick, District Attorney, Ninth Judicial District, State of Oklahoma; Honorable Rose Jarvis, District Court Clerk, Payne County, State of Oklahoma; Honorable Frank Phillips, Sheriff, Payne County, State of Oklahoma, and Honorable Hilary Driggs, Chief of Police, Stillwater, Oklahoma, and request this Court to affirm the ruling of the three-judge United States District Court for the Western District of Oklahoma whereby the Court refused to enjoin the Oklahoma Statutes prohibiting sale of 3.2 per cent beer to males 18 through 20 years of age, while allowing such sale to females of the same ages, as applied to such sales for consumption off the premises of the vendor. The District Court's opinion is set out in full in the Appendix of the Jurisdictional Statement of appellants.

STATEMENT OF FACTS

Appellees are in substantial agreement with the sequence of events set forth in appellants' Jurisdictional Statement generally contained in parts A through C. Appellees further stipulate that the Appendix is an accurate reproduction of the opinions, judgments and law which they purport to depict, and the same are hereby adopted by appellees as a basis for this Court sustaining this Motion to Affirm. Appellees disagree with the remaining contentions and assertions in appellants' Jurisdictional Statement and will direct this response to the main thrust of the Jurisdictional Statement contained in Section F.

ARGUMENT

This District Court's decision, which is lengthy and well reasoned, ultimately holds that the record supports the classification resulting from the Oklahoma Statutes as reasonable, not arbitrary, and rests on a ground of difference having a fair and substantial relation to the apparent objectives of the legislation. The legislation was not a denial of equal protection and in reaching this decision the trial court did not hold that the Twenty-first Amendment to the United States Constitution was determinative, rather, it only added weight to the classification determined to be reasonable.

PROPOSITION I

A FINDING BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT OF A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION IS NOT DETERMINATIVE OF THE ISSUE.

Appellants in Section F1, pages 10-11 of the Jurisdictional Statement, list first the decision by the United States Court of Appeals for the Tenth Circuit (on appeal from a Motion to Dismiss sustained by the trial court), which determined that a substantial federal question existed and remanded the case for hearing on the merits, as a ground on which this Court should accept for full briefing and oral argument this case on appeal. This proposition suggests that such a finding is binding upon this Court as determining a substantial federal question justifying full review. Appellees would respectfully suggest to the Court that the issue before the Tenth Circuit was whether or not a summary disposition of the allegations in the Complaint of the

appellants was justified. This determination obviously rejected such an assertion and remanded the case for full argument and trial on the merits by a three-judge panel. No opinion as to the merits of the case was forthcoming from the Tenth Circuit. See Sections F2-F3 in appellants' Jurisdictional Statement. This Court should determine in and of itself whether the questions presented by the appellants are substantial enough to justify full review and the Tenth Circuit's opinion is not determinative.

PROPOSITION II

THE PRESENCE OF AN AGE-SEX CLASSIFICATION DOES NOT AUTOMATICALLY PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant cites in Section F2 of the Jurisdictional Statement various other cases which this Court has decided which dealt in some degree with sex equality issues, and thereby appears to suggest that this Court should, by implication, determine that the case at bar must be substantial in the issues attempted to be presented. Appellant can merely respond that each case must stand on its own as to whether a substantial federal question is presented of sufficient scope and magnitude to justify this Court in requiring full briefing and argument.

PROPOSITION III

THIS CASE IS NOT IN CONFLICT WITH RECENT SUPREME COURT DECISIONS.

Appellants, in Section F3 of the Jurisdictional Statement, cite numerous cases with which they feel the decision below is in conflict, but fail at this point in their

Jurisdictional Statement to refer to *California* v. *LaRue*, 409 U.S. 109, which dealt most closely with sex equality in conjunction with the Twenty-first Amendment, and with which this case is most similar in legal context. In the case at bar, the State's right to regulate intoxicating beverages is an issue which the trial court took into consideration, although this Twenty-first Amendment right was not determinative of the constitutionality of the state statutes; and while appellants suggest that the decision of the trial court is in direct conflict with *Stanton* v. *Stanton*, ... U.S. ....., 43 L.Ed.2d 688, 95 S.Ct. ....., the trial court, indeed, carefully considered this recent opinion and concluded that the case at bar was quite distinguishable. The classification by statute was not based on "old notions" or on archaic or overbroad generalizations not tolerated under the Constitution. See page A17. Therefore, this case is not in conflict with any recent decisions of the Supreme Court on issues concerning sex classification in regard to the Fourteenth and Twenty-first Amendments.

PROPOSITION IV

THE CASE AT BAR DOES NOT REQUIRE THE PROMULGATION OF A NEW "TEST" FOR CLASSIFICATION STATUTES.

Appellants assert in Section F4 of their Jurisdictional Statement that the trial court erred in its determination of the proper test to be applied in considering the constitutionality of the state statutes. The trial court adopted the test set forth in *Reed* v. *Reed*, 404 U.S. 71. See pages A6-A8, and having applied the test to the evidence found "that a rational legislative judgment was made in the alcoholic beverage regulations" (see page A4). See also Section V of

the trial court's Opinion, pages A19-A20. It should be noted that the trial court placed the burden upon the State to prove the justification for the classification, page A6, and ultimately determined that the State had met that burden.

PROPOSITION V

THE TRIAL COURT PROPERLY EVALUATED THE RELATIONSHIP BETWEEN THE FOURTEENTH AND TWENTY-FIRST AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellants suggest in Section F4 of their Jurisdictional Statement that the trial court somehow "diluted" the Equal Protection Clause of the Fourteenth Amendment by adopting the Court's test in *Reed, supra*. This assertion completely ignores what the trial court actually did concerning the relationship between the Twenty-first and the Fourteenth Amendments. As stated at page A6 in the trial court's Opinion:

> "First, we feel the fact that the attack here is on an alcoholic beverage regulation, buttressed by the Twenty-first Amendment, does not call for the use of a less stringent equal protection standard than would otherwise apply, although we feel that this circumstance is to be weighed in our decision. The Supreme Court has recognized that its decisions do not go so far as to hold or say that the Twenty-first Amendment supersedes all other constitutional provisions in the area of liquor regulations. *California* v. *LaRue*, 409 U.S. 109, 115. See also *Hostetter* v. *Idlewild Liquor Corporation*, 377 U.S. 324, 332; *Women's Liberation Union of Rhode Island* v. *Israel*, ... F.2d ..... (1st Cir. 3/4/75). The demands of the Equal Protection Clause still apply, and the standards of revie (*sic*) that it mandates are not relaxed."

The appellants' assertion in this regard is completely without merit in that the trial court closely construed the state statutes and required the State to show that its classification was reasonable, thus, no dilution of equal protection has been accomplished. On the contrary, the Court very closely examined the Oklahoma Statutes in question and determined that they were reasonable.

PROPOSITION VI

IN THE ABSENCE OF A SUBSTANTIAL FEDERAL QUESTION THIS COURT NEED NOT REVIEW THE FINDINGS OF FACT OF THE TRIAL COURT.

Appellants suggest in Sections F6 and F7 that the evidence submitted by the appellees in and of itself raises a substantial federal question. Appellants ignore the trial court's actual findings of fact and purpose of the evidence by insisting that the trial court created and authorized a "permanent irrebuttable presumption of fact" to the effect that males in the 18-20 year-old group are somehow inferior. While the trial court specifically rejected this assertion in Section IV of its Opinion, pages A18-A19, the trial court properly pointed out that the case at bar does not create labels on individuals to their prejudice, and that there is no reasonable alternative available to the State in making the crucial determination in the case at bar as was presented in cases cited in said Opinion.

Appellants alone assert that the evidence submitted by the appellees shows some inferiority in the male class. While the thrust of the proof was not intended to, nor did it, show any such "fact". Rather, the Court's evaluation of the evidence and the proof that the evidence showed is

specifically set out in the Court's Opinion at page A14 as follows:

> "With this in mind, we find in the record sufficient support of the rationality of the limited sex-based classification in question under the *Reed* test. We find such support in the record data indicating more likely consumption of beer by males in the 18-20 age group; more driving in this age group by males with significant BAC levels than by females; the greater number of vehicle injuries in the younger male group; and the apparent relationship of such injuries to alcohol use. We conclude that the classification made has a fair and substantial relation to apparent objectives of the legislation for the protection of those affected and the public generally." (Footnotes omitted.)

As indicated above, there is a complete absence of any finding of male inferiority or indelible label placed on males in this age group as suggested by appellants. Appellants further disregard the fact that the classification is not merely for the protection of those within the class, but is for the protection of all of the public in the State of Oklahoma. Therefore, appellants' argument is completely misplaced and the emphasis upon what the appellants feel the evidence proved to them should not be equated with what the evidence proved to the trial court. Further, this Court need not speculate, as do the appellants, as to any other classification by race or otherwise which might, by some stretch of the imagination, be deemed approved by the Opinion of the trial court. The case at bar is limited to the very narrow classification of an age group of 18 to 20 and there only in the consumption of 3.2 per cent beer, which regulation is strengthened by reason of the Twenty-first Amendment. The trial court did not broaden this concept

nor does its decision have wide-ranging ramifications which might deny equal protection to the citizens of this nation as suggested by the appellants.

CONCLUSION

The trial court properly applied the test as set forth in *Reed* v. *Reed, supra,* and gave very close scrutiny to the statutes in question in conjunction with the Twenty-first Amendment and said decision is in all respects proper and the trial court properly denied the injunctive relief requested by the appellant. The findings of fact and conclusions of law of the trial court indicate no persuasive showing to support any of the complaints raised by the appellants. All issues raised were properly decided by the lower court. Accordingly, a full hearing of this case, including briefs and oral argument, is not necessary to a proper decision by this Court. Appellees respectfully request that the judgment of the District Court be affirmed.

Respectfully submitted,

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Counsel for Appellees

December, 1975

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument were served upon:

Mr. Frederick P. Gilbert
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

the only party to be served, by mailing such true and correct copies, postage prepaid, this ..... day of December, 1975.

.....

James H. Gray

Supreme Court, U. S.
FILED
MAR 1 1976
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

October Term, 1975

No. 75-628

CURTIS CRAIG,
and
CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Appellants,

vs.

Hon. DAVID BOREN, Governor, State of Oklahoma,
Hon. LARRY DERRYBERRY, Attorney General,
State of Oklahoma,
Hon. D. M. BERRY, Chairman,
Hon. LAWTON L. LEININGER, Vice-Chairman,
Hon. J. L. MERRILL, Secretary-Member,
Oklahoma Tax Commission,
Hon. RAY WALL, Presiding Judge,
Ninth Judicial District Court, State of Oklahoma,
Hon. CHARLES H. HEADRICK, District Attorney,
Ninth Judicial District, State of Oklahoma,
Hon. ROSE JARVIS, District Court Clerk,
Payne County, State of Oklahoma,
Hon. FRANK PHILLIPS, Sheriff,
Payne County, State of Oklahoma,
and
Hon. HILARY DRIGGS, Chief of Police,
Stillwater, Oklahoma,
Appellees.

BRIEF OF APPELLANTS

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Proposition II: *The "statistics" adduced by the State are totally incompetent, under all theories of mathematics and law, to reliably tell us anything about the behaviour patterns of any sex or age group involved herein, with respect to 3.2% alcohol, or anything else.* 20

Proposition III: *The discrimination at bar absolutely fails to satisfy even the minimal criteria of the traditional test for mere rationality.* 43

Proposition IV: *The juridical equality of male and female American citizens is a positive rule of law; the District Court therefore erred in even entertaining the State's offer to "disprove" this juridical equality as though it were a mere question of fact subject to an "evidentiary" attack.* 47

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In The
Supreme Court of the United States

October Term, 1975

No. 75-628

CURTIS CRAIG,
and
CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Appellants,

vs.

Hon. DAVID BOREN, Governor, State of Oklahoma,
et al.,
Appellees.

BRIEF OF APPELLANTS

COME NOW APPELLANTS, and for their Brief herein, respectfully argue and urge as follows:

THE DECISION HEREIN APPEALED

The decision whose reversal is sought herein is (or was) styled *Mark Walker, and Carolyn Whitener d/b/a "The Honk and Holler,"* v. *Hon. David Hall, Governor, State of Oklahoma, et al.*, United States District Court for the Western District of Oklahoma (three-judge panel), No. CIV-72-867, Memorandum Opinion and Judgement filed May 17, 1975, Motion for New Trial overruled July 14, 1975. The decision ("Memorandum Opinion") is reported at 399 F. Supp 1304. The decision, and the formal Judgement (not reported) are also reproduced as Appendices A and B, respectively, to the Jurisdictional Statement herein.

JURISDICTION

Jurisdiction to review the three-judge District Court decision below by direct appeal is conferred upon the Supreme Court by 28 U.S.C. 1253. Notice of Appeal was filed on August 11, 1975, and pursuant to extension of time allowed by Mr. Justice White, the Appeal herein was docketed on October 28, 1975.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes in issue in this Appeal are 37 Okla.Stat., 1971, Sec. 241, in conjunction with 37 Okla.Stat., 1975 Supp., Sec. 245. These statutory sections read as follows:

MINORS

§241. Sale, barter or gift to minor unlawful. — It shall be unlawful for any person who holds a license to sell and dispense beer and/or any agent, servant, or employee of said license holder to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) per cent of alcohol measured by weight. Provided, a parent as regards his own child or children, is excepted from the provisions of this Act.

§245. "Minor" defined. — A "minor", for the purposes of Sections 241 and 243 of Title 37 of the Oklahoma Statutes, is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years.

It is contended that the foregoing statutory scheme, insofar as it purports to forbid the sale of 3.2% beer to or the purchase thereof by male persons 18 to 21 years of age, is void and unconstitutional as repugnant

to and violative of the Equal Protection of the Laws and the Due Process of Law Clauses of the Fourteenth Amendment to the Constitution of the United States, which read, in relevant part, as follows:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

The ultimate question herein is simply whether 37 Okla.Stat. 241, 245, is constitutional.

Posed in the framework of this case, however, the included questions relate to the evidentiary aspects of the sex-discrimination/civil-rights problem, chiefly: to what extent, if any, is "evidence" purporting to "prove" one sex's or the other's "inferiority" (or "difference," or whatever else we may want to call it) even judicially cognizable at all in Federal Equal Protection litigation; if such evidence is indeed cognizable at all, and is statistical in nature, what safeguards must be erected to protect against the obvious abuses inherent in and the inevitable misuses of such data; and finally, how *much* of a "statistical" inequality between males and females must be proven before a *statutory* inequality can claim an immunity to the obvious meaning and mandate of the Equal Protection guarantee?

STATEMENT OF THE CASE: BACKGROUND, HISTORY, FACTS

The history of this litigation in the Courts below, with the chief developments and chronology thereof, is already detailed in the Jurisdictional Statement, Part E,

"Statement of the Case," pp. 7-10, and need not be reproduced here. See also the District Court docket sheets (App., pp. 1-5), and the rest of the Appendix herein.

To understand the particular age-sex discrimination at bar, and the mentality and motives which led to the enactment thereof, some review of its legislative history is helpful. The original predecessor of the discrimination at bar appears to date from Oklahoma's very first Territorial Legislature, in 1890. Curiously, the "liquor" provisions thereof did *not* contain the discrimination. Section 3258 of the Statutes of Oklahoma, 1890 (Chapter 48, Liquors, Art. 1, Sec. 8), p. 655, prohibited the sale of liquor to "any minor, apprentice or servant under twenty-one years of age," and Section 2544 of the said 1890 Statutes (Chapter 25, Crimes and Punishment, Art. 57, Offenses Pertaining to Sale of Intoxicating Liquors, Sec. 4), p. 513, forbad the sale of liquor to "minors." Attention is invited to the seeming contrast between "any minor, apprentice or servant under twenty-one years of age" of Section 3258, supra, and simply "minors" of Section 2544. This contrast was more apparent than real, however, for it was Section 3966 of the 1890 Statutes (Chapter 64, Persons, Sec. 1), p. 752, which alone contained the [generalized] Territorial definition of "minors," to wit:

> "Minors are:
> First. Males under twenty-ones years of age.
> Second. Females under eighteen years of age."

Thus, since a female at 18 might be "under twenty-one years of age," she was not a "*minor* . . . under twenty-one years of age," and the sale of *any* liquor was therefore legal to a female upon the attainment of her 18th birthday, since, per Section 3966 quoted above,

females were fully adult at that point for virtually *all* civil majority purposes *in general*.

But why, then, was this generalized discrimination itself adopted? We may never know exactly the reasoning relied upon, as no "legislative history" materials on the background of Oklahoma's Territorial laws have been discovered to exist by either side to this lawsuit. [In fact, even today, the Oklahoma Legislature does not report and publish floor debates, committee and subcommittee hearings, and the like, as does the Congress.] However, it is doubtless fair to say that the Oklahoma Territory simply adopted the 18/21 female/male differentiation for the same reason or reasons that many States, especially in the Mid-West and the West, had adopted same in the Nineteenth Century (and in fact were retaining it until just the very past couple of years or so).

So far as can now be determined, we can only say that this archaic, Nineteenth Century scheme of 18 for women and 21 for men for civil majority, and whose last, dying vestiges are attacked herein, *probably* derived from Victorian and Frontier notions of "naturally" and/or "divinely" mandated and stereotyped sex roles in life and society for males, and females, 'respectively.' *Possibly* this discriminatory scheme reflected some sort of a "folk myth" that girls "matured" more rapidly than boys; and *possibly* again, it reflected a prejudice that boys were somehow deemed "entitled" to several more years of parent-supported and -financed education and training, whether formal or otherwise, than were girls. *Perhaps* also the intent was not as discriminatory as the actuality of these laws: *maybe* it simply reflected a sentiment that the male ought to be the breadwinner of the family, a responsibility then conceivably thought to

require at least 21 years of education, experience and maturity before the successful discharge thereof could reasonably be expected, whereas the female was thought of as "merely" the cook, housekeeper and bearer of children, which "lesser" obligations were arguably thought of as more easily dischargeable at a somewhat earlier age. Such, anyway, *appear* to be the "old notions" upon which the generalized age-sex discrimination underlying this case was founded, see *Stanton* v. *Stanton* (1974) 30 Utah 2d 315, 517 P.2d 1010, 1012, and *Jacobsen* v. *Lenhart* (1964) 30 Ill.2d 225, 195 N.E.2d 638, 640.

At any rate, by the time of Oklahoma's first major post-Statehood recodification in 1910, only one minor variation on the Territorial scheme had occurred. There was now just one sale-of-liquor-to-minors provision, to wit, Section 3607, Revised Laws of Oklahoma, Annotated, 1910 (Vol. I, Ch. 39, Intoxicating Liquors, Art. 3), p. 930, and it only referred to "minors," not to "minors . . . under the age of twenty-one." As before, this "Intoxicating Liquors" chapter itself still did *not* define "minors," but rather, it merely continued to adopt the *generalized* "minors" definition, of Section 879, R.L., 1910 (Vol. I, Ch. 12, Contracts, Art. 1), p. 238, which retained 18 for women and 21 for men as the ages for their civil majority in general.

The curiosity of the "*non*-intoxicating" alcoholic beverage in issue in this case was added to Oklahoma's laws shortly after Repeal (U.S. Const., Amend. XXI). House Bill 647, Fourteenth Legislature, Oklahoma Session Laws, 1933, Ch. 153 (enacted by popular referendum, Id., Ch. 70, pp. 124-126), defined as "non-intoxicating" any beverage (usually beer) whose alcohol content was 3.2% or less. Id., Sec. 1, p. 338. This statutory designation of beverages containing 3.2% alcohol or less as "*non*-intoxicating" was to some extent necessary because the State Constitution, Art. 1, Sec. 7, and the "Prohibition Ordinance" thereto (1907), prohibited the sale of "intoxicating" liquors, but without defining the quantum of alcohol needed for a beverage to be deemed "intoxicating." [The 3.2% designation as the boundary of alcohol's "intoxicability" was upheld by the Oklahoma Supreme Court in *State ex rel. Springer* v. *Bliss* (1947) 199 Okla. 198, 185 P.2d 220.[1]]

In the current decennial revision of the Oklahoma code, the Oklahoma Statutes, 1971, non-intoxicating beverages are governed in Chapter 2 to Title 37 thereof. It is interesting to note that as late as this most recent, i.e., 1971, recodification, the "sale-to-minors" sections, 37 O.S. 1971, Sec. 241 (et seq), *still* did not themselves define "minors," but instead, as before, continued simply to employ Oklahoma's generalized "minors" definition, contained in Section 13 to Title 15 (Contracts) of the Oklahoma Statutes, 1971, and which was, also as

[1]Just where the figure "3.2" came from is not entirely clear, but it probably reflected medical opinion that the average human body could metabolize alcohol in concentrations of 3.2% or less as fast as the normal rate of ingestion in conventional usage, and thereby forestall that *accumulation* of alcohol in the body that actually leads to intoxication. Language suggesting that 3.2% beer can intoxicate appears in the Oklahoma Criminal Court of Appeals decision of *Ashcraft* v. *State* (1940) 68 Okla.Cr. 308, 98 P.2d 60, but that is not strictly holding since the appellant therein had obviously been imbibing something considerably stronger than the proverbial "only two beers." In Oklahoma, the Supreme Court is the State's highest tribunal, *Dancy* v. *Owens* (1927) 126 Okla. 37, 258 Pac. 879, Okla.Const., Art. VII, Sec. 4, and the Criminal Court thereafter accepted the authoritativeness of the Supreme Court's pronouncement in *Springer-Bliss*, supra, see *State* v. *Manard* (1947) 85 Okla.Cr. 105, 185 P.2d 483.

before, the same 18 for women and 21 for men for civil majority in general.

But 18 for women and 21 for men was only the 1971 (and preceding) Statutes' *civil* adulthood age-sex discrimination in Oklahoma. Contrary thereto, however, for *criminal* purposes a male became an "adult" and hence prosecutable as a felon at 16, but a girl not until 18 (remaining till then only "civilly" processable as a mere juvenile or delinquent). 10 Okla.Stat., 1971, Sec. 1101(a).

So, what we had as late as 1971 in Oklahoma were absolutely conflicting "permanent irrebutable presumptions of fact" that the young female was, for *civil* purposes, deemed to be three years more mature than the male, yet for *criminal* purposes, the young male was deemed to be two years more mature than the female. Thus, as a "civil" adult and hence "competent" to run her own life under 15 O.S., 1971, 13, the female at 18 could, in addition to buying all the 3.2% beer her car would carry, also legally marry (43 O.S. 3), enter contracts (15 O.S. 14), convey land (16 O.S. 1), grant deeds of trust (46 O.S. 31), buy, possess, and smoke cigarettes (21 O.S. 1241-1244), enter and loiter in pool halls (21 O.S. 1103(2)), purchase concealable weaponry in unlimited amounts (21 O.S. 1273), and Heaven knows what else; yet the young man, suffering under the tutelage of infancy, could do none of these things until three years later. In fact, about the only thing the young man 18-21 *could* do legally on his own was to enlist (or be drafted) into the Armed Forces (which in those days carried a risk far disproportionate to the degree of maturity which Oklahoma was willing to concede *he* had, but which was freely acknowledged as possessed by his like-aged sister or girlfriend).

However, to back up several years in age, the young boy of 16 or 17, as a "criminal" adult and hence

fully "accountable" for his misconduct "like a man," 10 O.S. 1971, 1101(a), could easily get ten years in the Penitentiary for sharing his marijuana cigarettes with his like-aged (but criminally "immature") girlfriend (63 O.S. 2-401(B)(2)), ten years for getting caught in a penny-ante poker game with her (21 O.S. 941), five years for making "orthodox" love to her (21 O.S. 1120), ten years for "unorthodox" love with her, (21 O.S. 886), another ten for asking her in writing about it (21 O.S. 1021), and so on — yet the like-aged female, though doing the identical (or even worse) acts, nevertheless enjoyed a relative immunity under a presumption she was still "incapable of knowing right from wrong," 10 O.S. 1112(b), and could get *at most* up to only two years in a home for wayward and fallen girls. Nor does the difference in "time" tell the whole story: The 16-18 year old boy, as an "adult felon," also lost his right to vote (Okla.Const., Art. III, Sec. 1), to bear arms (21 O.S. 1283), to run for public office (26 O.S. 162), enjoy other State employment (51 O.S. 24.1), or sit on a jury (38 O.S. 28); he also became excluded for life from numerous commercial endeavors and careers, and he even suffered certain Federal disabilities, such as enlistment into the Armed Forces, 10 U.S.C. 504 — all of which the *criminally* "immature" and hence *non*-felon girl was exempt from, 10 O.S. 1127(b), along with (to protect her "innocence") a right to *privacy* in the proceedings against her, 10 O.S. 1111, 1125, 1127(a), 1506. And then, as the ultimate absurdity, once the 17 year old girl would be caught, say, selling heroin to a 15 year old boy (so that *both* were juveniles), the *criminal* age-sex discrimination *lapsed*, whereupon our familiar 18/21 *civil* discrimination came *back* into play as the *release* ages for females and males, respectively, 10 O.S. 1139(b), meaning, in effect, that our 17-year-old female dope

pusher would get *one* year in reform school (to 18), but the 15-year-old male dope possessor (actually her victim) *six* years (to 21)! One truly wonders just where in this age-sex madhouse Oklahoma might have tried to pigeonhole the young transexual, hermaphrodite, or congenitally nonsexed person (and indeed, at what age such unfortunates might even today be allowed to purchase their 3.2% beer).

But to re-emphasize the point of reviewing the Oklahoma's various and conflicting age-sex discriminations existing as late as 1971: (1) they were all generalized discriminations, broken down only as far as the broad categories of "civil" and criminal," but not otherwise directed towards any specific problem in particular, such as alcohol; (2) they had already existed in Oklahoma for decades, and, in the case of the civil discrimination, even before the very invention of the automobile; (3) the very contradiction between the civil and the criminal discriminations' order of the two sexes' attainment of "adulthood" belies any assertion that the Legislature even *could* have "found" that one sex "matures" earlier or more rapidly than the other; or (4) if it should be claimed that the Legislature *did* make such a "finding," it would inescapably have to appear that the Legislature had done so on the basis of evidence and data which were available to it long before 1971.

Such, anyway, was the status of Oklahoma's varying age-sex irrationalities as late as 1971, and of which the instant discrimination is about the last survivor. However, several juridical events occurred in later 1971 and early 1972 which shook this incoherent scheme to its foundations, namely, the Supreme Court's decision in *Reed* v. *Reed*, 404 U.S. 71 (November, 1971), the ratification of the Twenty-Sixth Amendment (July, 1971), and

most directly in point, the Tenth Circuit's decision in *Lamb* v. *Brown*, 456 F.2d 18 (March 16, 1972), which held Oklahoma's *criminal* age-sex discrimination, 10 O.S. 1971, Sec. 1101(a), supra, unconstitutional as violative of Equal Protection. Within a matter of about two weeks from the *Lamb* decision the Oklahoma Legislature had amended 10 O.S. 1971, Sec. 1101(a), supra, to make 18 the juvenile/adult cut-off age for both sexes for criminal purposes. House Bill 1705, Oklahoma Session Laws, Ch. 122, p. 143, April 4, 1972 (codified as the present 10 O.S. 1975 Supp., Sec. 1101(a)); and almost contemporaneously therewith the Legislature, which logically had also been deliberating the unquestioned unconstitutionality of Oklahoma's *civil* age-sex discrimination too, 15 O.S. 1971, Sec. 13, supra, adopted this same age of 18 for Oklahoma's civil majority (for both sexes) as well. Senate Bill 515, Oklahoma Session Laws, 1972, Ch. 221, pp. 332 et seq (April 7, 1972), now codified primarily as 15 O.S. 1975 Supp., Sec. 13.

However, due to Fundamentalist opposition to any legislative action combining the twin anathemas of "sex equality" with "beer," a specific exception in Senate Bill 515, supra, had to be made to preserve the 18/21 female/male discrimination for non-intoxicating liquors. This reservation is codified as 37 Okla.Stat., [1972, 1973, 1974, and] 1975 Supp., Sec. 245, which is precisely the statute squarely challenged in this instant Appeal.[2]

[2]A 1973 legislative attempt to equalize the age-sex reservation for beer also failed because of sectarian opposition. The principal preacher appearing to oppose age-sex equalization for beer testified that its retention was necessary to preserve young men from the "pool, beer, and girls" syndrome. See article, "Committee Votes to Adjust Legal Beer-Buying to Age 19," Tulsa Tribune, Tuesday, February 13, 1973, page one (although the exposure of young women to pool, beer and *men* did not appear to pose any theological problems.)

The discrimination obviously could not and cannot be defended on *these* bases, but the succession of the asserted and ostensible "legislative policies" that *were* claimed for it throughout this litigation is instructive. The original policy claimed was the "earlier female maturation" theory, see the Motion to Dismiss, App., 19. In the Appellees' (hereinafter "the State") brief to the Tenth Circuit, App., 22, the *sole* purpose advanced was asserted conclusorily to relate "to the health, safety, and welfare of all the citizens of Oklahoma." App., 23. Orally, however, the State urged the "must have been" argument (that *surely* there "must have been" *some* legitimate purpose for it, or *surely* the Legislature wouldn't have enacted it), although when pressed the State finally conceded that it simply "didn't know" its original purpose as the relevant historical materials had unfortunately been lost. The Answer urged a "greater potential for causing harm" since young males "consume 3.2% beer in a greater quantity than females," App., 32, although in the Pre-Trial Order the State claimed no more than "that the rationale for the sexual differentiation at bar *appears* to be that youthful males present a graver driving-while-intoxicated problem than do youthful females," App., 35 (emphasis added). Finally, at trial, the asserted justification was declared to be that young males "drive more, drink more and commit more alcohol-related offenses," App., 43, whereupon the State proceeded to put on a case which expanded the issues considerably beyond the driving-while-intoxicated limitation of the Pre-Trial Order, App., 52.

So, in the final analysis, we see that our lingering, moribund discrimination at bar was in its inception based precisely on the very "old notions" and "demonstrated facts of life" condemned in *Stanton* v. *Stanton*, 421 U.S. at 10, 14, and *Lamb* v. *Brown*, 456 F.2d at 20.

The discrimination never related directly to 3.2% beer at all until 1972, and it was retained with that specific orientation then only because of blatantly sectarian influences in the Legislature.

The Appellants' evidence consisted essentially of expert testimony which clearly established that there is absolutely *no* scientific (including psychiatric and sociological as well as physiological) justification for the discrimination in question; and the State relied exclusively on statistical data (published *after* the statute's 1972 reenactment) which it claims is relevant to justifying the instant age-*sex* discrimination as indicating that the "average" young male's sobriety rate may be as much as one or two percent less than the "average" young female's — but which data the State expressly confessed would be insufficient to justify a like age-*racial* discrimination, App., 97-98.

A detailed examination of the evidence upon which the District Court sustained the instant discrimination is offered in Proposition II to this Brief.

SUMMARY OF ARGUMENT

1. The instant age-sex discrimination is squarely *contra* to this Court's authoritative pronouncement thereon in *Stanton* v. *Stanton*, 421 U.S. 7, and to every other extant ruling on the subject, *Bassett* v. *Bassett* (Okla. App., 1974) 521 P.2d 434, *Harrigfeld* v. *District Court* (1973) 95 Idaho 540, 511 P.2d 822, *Tang* v. *Ping* (N.D., 1973) 209 N.W. 2d 624, and *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18. See also *Frontiero* v. *Richardson* (1973) 411 U.S. 677, and *Reed* v. *Reed* (1971) 404 U.S. 71.

2. The sex-equality principle is in no sense "diluted" in the context of alcohol. *White* v. *Fleming* (7th

Cir., 1975) 522 F.2d 730; *Women's Liberation Union* v. *Israel* (1st Cir., 1975) 512 F.2d 106; *Sai'ler's Inn, Inc.* v. *Kirby* (1971) 5 Cal.3d 1, 485 P.2d 529. *Goesaert* v. *Cleary* (1948) 335 U.S. 464, and *Cronin* v. *Adams* (1904) 192 U.S. 108, are presented for overruling.

3. The State's statistics prove nothing: they are mere arrest, not conviction, statistics; they do not reveal the actual number of respective young adults involved with alcohol; they do not appear to relate to the 3.2% alcohol in issue herein; their averages are unweighted and "stacked"; but even accepting them they "prove" nothing more than a *de minimis* difference in the male-female sobriety rates, suggesting "experimental error" or "random deviation" rather than any innate or organic difference.

4. The discrimination is wholly irrational with respect to its asserted purpose of restricting 3.2% alcohol to responsible young adults, in that it bars the soberest of the males therefrom, while allowing access thereto to the drunkennest of the females. In any event it accomplishes nothing more than requiring a male to purchase his beer in a two-step transaction, while allowing the female to buy hers in a one-step transaction.

5. Since the full equality between the sexes has become a positive rule of law, and is no longer a question of controvertible fact, it was erroneous for the District Court even to have entertained an attempt to "disprove" the said equality.

PROPOSITION I

THE DECISION BELOW IS SO TOTALLY CONTRARY TO ALL THE MODERN RULINGS ON THE SUBJECT, TO INCLUDE THE AUTHORITATIVE PRONOUNCEMENTS OF THIS HONORABLE

COURT, THAT IT SAFELY MAY AND SHOULD BE SIMPLY REVERSED, WITHOUT ANY NEED FOR A DETAILED AND EXHAUSTIVE REVIEW OF ITS BELABORED REASONING AND TENUOUS EVIDENCE.

All the modern authorities (or at least those still extant) fully support the Appellants' prayer for reversal. Most in point, of course, is this Honorable Court's pronouncement in *Stanton* v. *Stanton* (1975) 421 U.S. 7, that statutory schemes allowing the rights of adulthood to females at 18 while withholding same from males to 21 are in obvious contravention of Fourteenth Amendment Equal Protection. And *Stanton* v. *Stanton* was, of course, but a corollary of this Court's previous pronouncements that statutory discriminations based on the mere sex of the citizens are, with but rare exceptions, categorically unconstitutional. *Frontiero* v. *Richardson* (1973) 411 U.S. 677, *Reed* v. *Reed* (1971) 404 U.S. 71; see also *Weinberger* v. *Wiesenfeld* (1975) 420 U.S. 636, and compare *Taylor* v. *Louisiana* (1975) 419 U.S. 522.

So well established has this principle become in recent years, in fact, that it would be next to impossible even to cite, let alone discuss, the expanding plethora of *lower*-court decisions reciting the same obvious principles. Appellants will therefore content themselves with the mere enumeration of some of those voiding *age*-sex discriminations in particular, not only the "conventional" ones of 18 for women and 21 for men, *Harrigfeld* v. *District Court* (1973) 95 Idaho 540, 511 P.2d 822, *Tang* v. *Ping* (N.D., 1973) 209 N.W.2d 624, *Phelps* v. *Bing* (1974) 58 Ill.2d 32, 316 N.E.2d 775, but also several variations thereon, *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, *Patricia A.* v. *City of New York* (1972) 31 N.Y.2d 83, 286 N.E.2d 432, and *Ex Parte Matthews*

(Tex.Cr., 1973) 488 S.W.2d 434; see also *Radcliff* v. *Anderson* (10th Cir., 1975) 509 F.2d 1093 (en banc), cert. den. ___ U.S. ___, 44 L. Ed.2d 95, 95 S. Ct. 1667 (holding *Lamb* v. *Brown*, supra, retroactive).

One particular irony of the instant Appeal is that even Oklahoma *itself* has now held the pre-1972 version of the instant discrimination unconstitutional! *Bassett* v. *Bassett* (Okla. App., 1974) 521 P.2d 434, paraphrasing, at 436, almost *verbatim* the Supreme Court's epochal language in *Frontiero* v. *Richardson*, supra, 411 U.S. at 686-7 — and in a way that implies a *retroactive* voiding of Oklahoma's mostly-repealed 18/21 female/male discrimination. Thus, but for the fortuitous circumstance of their having elected the Federal forum below, the Appellants would by now have won their case a year or so ago!

Nor can the fact that the instant discrimination involves alcohol be a basis for "distinguishing" *Stanton* v. *Stanton* and *Bassett* v. *Bassett*. The modern cases have all reached the contrary conclusion, even in the State courts, *Sailer's Inn, Inc.* v. *Kirby* (1971) 5 Cal.3d 1, 485 P.2d 529, *Peterson Tavern & Grill Owners' Assn.* v. *Borough of Hawthorne* (1970) 47 N.J. 180, 270 A.2d 628, *Commonwealth* v. *Burke* (Ky., 1972) 481 S.W.2d 52, cf. *Brown* v. *Foley* (1947) 158 Fla. 734, 29 So.2d 870, as well as in the Federal, *White* v. *Fleming* (7th Cir., 1975) 522 F.2d 730, affirming 374 F.Supp. 267 (E.D. Wisc., 1974), *Women's Liberation Union* v. *Israel* (1st Cir., 1975) 512 F.2d 106, affirming 379 F. Supp. 44 (D.R.I., 1974), *Daugherty* v. *Daley* (N. D. Ill., 1974) 370 F. Supp. 338 (three-judge court), and see also *McCrimmon* v. *Daley* (7th Cir., 1969) 418 F.2d 366, and *Seidenberg* v. *McSorley's Old Ale House* (SDNY, 1970) 317 F.Supp. 593. In fact, the District Court's tone was

so uncertain on this "alcohol" point that it is not entirely clear that *Stanton*, *Lamb*, *Bassett* and the others *were* distinguished on the Twenty-First Amendment basis. Significantly, the District Court avoided even the citation of such seemingly relevant decisions (at least from the *in*equality standpoint) as *Goesaert* v. *Cleary* (1948) 335 U.S. 464, and *Cronin* v. *Adams* (1904) 192 U.S. 108.

What the District Court *did* do, however, was to "distinguish" *Stanton* v. *Stanton*, *Lamb* v. *Brown* and similar cases on the asserted basis that those decisions were decided as abstract questions of pure law, whereas *this* case turned on the *facts* — that is, that while *Stanton*, *Lamb*, et al. had voided age-sex discriminations which depended on no more that *factually-unsupported* "old notions" and "facts of life," 421 U.S. at 10, 14, and 456 F.2d at 20, in *this* case the State officials actually "proved" the unfavored sex's "inferiority" with respect to the subject-matter of the discrimination (or "demonstrated a difference," or whatever we may want to call it). And just what *was* this male "inferiority" that was "proven" by the "factual evidence?" Essentially, the District Court "found" that whereas some 99+% of the *female* young adult population presently appears to be free from socially-objectionable involvement with alcohol, nevertheless, by "contrast," it is "only" 98% of the youthful *male* population that appears free therefrom; and after ten belabored, tortured pages of printed opinion text in the Federal Supplement, plus eight pages of a veritable telephone-book of statistical appendices, the District Court concluded that this *less than two percent* "proven" difference suffices to avoid the "pure law" decisions in *Stanton*, *Lamb*, etc., and to uphold the discrimination at bar on the basis of the "factual" stereotype of the *entirety* of the male sex as set and depicted

by the *offending two percent* thereof. Contra, *Stanley* v. *Illinois* (1972) 405 U.S. 645, *Cleveland Board of Education* v. *LaFleur* (1974) 414 U.S. 632, *Turner* v. *Dept. of Employment* (1975) _____U.S._____, 46 L.Ed. 2d 181, 96 S.Ct. 249, and see *Leary* v. *United States* (1969) 395 U.S. 6, 32-54.

The only historical example Appellants can offer that parallels the situation at bar is that of the *racial* equality decisions of the Ninteen-Fifties, chiefly *Brown* v. *Board of Education* (1954) 347 U.S. 483, and the "massive resistance" that followed, both in as well as out of the courts. For a long time the legal theory persisted in the South that *Brown* had been rendered on the basis of a "pure" or an "abstract" question of law (or mostly "law" with "inadequately-developed facts"). Therefore, the segregationist forces concentrated *inter alia* on an effort to "educate" the Federal Judiciary, and even, it was hoped, the Supreme Court itself, pursuant to an evidentiary demonstration to develop a "record" of "scientific facts," "expert testimony," and "social data and statistics," upon which a lower Federal court could make a segregation-favoring "finding of fact" that would either be "binding" on the Supreme Court under some rule relating to limitations on the appellate review of judically-found facts, or which might even convince the Court that its *Brown* v. *Board of Education* decision had been based on misconceptions of biological truth, and was therefore more dictum than holding.[2.5]

The most celebrated of these "factual" or "statistical" attempts to overcome (or "distinguish") *Brown* was

[2.5]See *Challenge to the Court*, Social Scientists and the Defense of Segregation, 1954-1966, by I. A. Newby (Revised Edition, 1969, Louisiana State University Press, Baton Rouge, La.), esp. Ch. 8, "Efforts to Reverse the Brown Decision," pp. 185-212.

Stell v. *Savannah-Chatham County Board of Education* (S.D.Ga., 1963) 220 F.Supp. 667. An examination of that decision reveals an astonishingly close parallel to exactly how the District Court in this case has purported to avoid the unmistakable mandate of *Stanton* v. *Stanton* and related pronouncements. The short shrift given to *Stell*[3] should likewise dictate the outcome to this virtually identical case. The time has passed for avoiding on such bases the Supreme Court's most solemn pronouncements on fundamental guarantees of justice and equality in the racial, the sexual and related contexts. American men and women can no longer accept for their Equality guarantee anything less than "the pledge of the protection of equal laws," *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356, 369, and *certainly* not when the very "statistics" being relied on to "nullify" the Equal Protection Clause "prove" no more than the mere *percertage or two* differentiation which the instant "data" are said to disclose.

In fact, not only is the flat rejection of the "statistics" approach to "factually demonstrate" some group's "inferiority" (however expressed) now constitutionally mandated as a matter of law, such rejection is also

[3]After a couple of mesne reversals, 318 F.2d 425 and 333 F.2d 55 (5th Cir., 1963-64), certiorari was denied, sub nom. *Roberts* v. *Stell*, 379 U.S. 933, 13 L.Ed.2d 344, 85 S.Ct. 322 (1964), despite the fervent urgings of a number of Southern attorneys general to accept *Stell* as a vehicle for reexamining *Brown*. An attempt to evade the appellate mandate, 255 F.Supp. 83, 255 F.Supp. 88 (S.D.Ga. 1966), was again reversed, 387 F.2d 486 (5th Cir., 1967), and so ended the chief effort to "relitigate" *Brown* from an "evidentiary" standpoint. A similar celebrated "evidentiary" attempt to "disprove" *Brown's* factual premises was buried in *Jackson Municipal Separate School District* v. *Evers* (5th Cir., 1966) 357 F.2d 653, and finally abandoned upon the denial of certiorari, 384 U.S. 961, twelve years after *Brown*.

necessary as a sound judicial pre-emptive measure to preserve our courts from evermore getting drawn into the "statistics" quagmire that has engulfed *this* litigation, as will be amply depicted in the Appellants' next and regrettably but unavoidably exhaustive Proposition.

PROPOSITION II

THE "STATISTICS" ADDUCED BY THE STATE ARE TOTALLY INCOMPETENT, UNDER ALL THEORIES OF MATHEMATICS AND LAW, TO RELIABLY TELL US ANYTHING ABOUT THE BEHAVIOUR PATTERNS OF ANY SEX OR AGE GROUP INVOLVED HEREIN, WITH RESPECT TO 3.2% ALCOHOL, OR ANYTHING ELSE.

Turning now to the Record, we see little or no dispute over the authenticity of the items adduced, the chief controversy being essentially as to whether any of these items are judicially cognizable, and if so which ones, and then, of course, the interpretation placed thereon.

The Appellants' evidence consisted chiefly of the expert testimony of a practicing psychiatrist holding a baccaleaureate in biology and chemistry as well as an M.D. degree, App. 73-74, and a professor of biological psychology at the Oklahoma University Medical School's Center for Alcohol-Related Studies, App., 112-113. They testified in essence that there is absolutely no scientific basis whatsoever for the discrimination in question, whether viewed from the standpoints of structural anatomy, biology, chemistry, endocrinology, neurology, medicine, psychology, psychiatry, sociology, or whatever, App., 85-86; that the effect of alcohol upon the human species is independent of the sex of the individual and

that there are absolutely no differences in particular between males and females 18 to 21 years of age with regard to either maturity, intelligence, or any related quality (with particular reference to alcohol). App., 75-86, 121. The only *caveats* expressed were that males, being more muscular, could for that reason be viewed in a general sense as more "active" than females, App., 92, 94-96; that females, being somewhat smaller and having somewhat lesser body fluid than males, could for that reason be viewed in a general sense as possibly more affectable by equivalent amounts of alcohol than males, App., 83, 85, 107, 114-121, 151-174; that young men might possibly have a greater socially-induced but not innate, App., 108-109, "interest" and "curiosity" in alcohol (as well as a number of other things) than young women, App., 93-94; that in later life (from about the fifth decade on) App., 106 there appear to be more males than females who seek clinical help for alcohol-related problems; but that in any event the actual proportions of either sex having any real problems with alcohol are extremely minimal, App., 100-101; and that the view of modern science is that there is no essential difference between the sexes with respect to the intake and handling of alcohol, App., 142-147, 150.

The State stipulated to the expert qualifications of the Appellants' expert witnesses, App., 75, 113-4, and offered no experts of its own. Except for the *caveats* above enumerated, the cross-examination of the expert witnesses elicited nothing to impeach their testimony-in-chief that the discrimination in issue is totally devoid of *any* basis in scientific fact.

So, the discrimination before us must stand, if at all, *solely* on the strength of the State's "statistics," and on the validity of the inferences which the District

Court drew therefrom; and, until sexual Equal Protection litigants can be authoritively assured of the *im*propriety of even the *offer* of "statistical" data to "prove" one sex's or the other's "inferiority," the instant Appellants will have no alternative but to urge a detailed scrutiny of *precisely* those "statistics" in this case.

Let us begin with State's Exhibit 1, summarized in relevant part in the appendix to the District Court's decision, 399 F.Supp. at 1314, and Jurisdictional Statement at A22. This was an extract of State-wide arrest data in Oklahoma in 1973, and is selected for the focal point of our study as the exhibit purporting to be the most in point, and also because the State's other exhibits were merely cumulative thereto.

The first reason why the District Court should have rejected the offer of this Exhibit outright, or certainly declined to be swayed thereby, is, as stated, that the Exhibit only discloses *arrest*, not *conviction*, data.[4] That is, since arrests are nothing more than glorified *accusations* or *allegations*, and since under American law an *individual* man (or woman) cannot be deemed guilty of anything until convicted thereof,[5] it is likewise impermissible for a court of law even to speculate, let alone conclude anything about some group's *collective* guilt from "data" merely reflecting a number of *arrests* for some offense or another within that group. What *could* have been relevant in this case might have been the *conviction* data for the sex(es) in question, assuming, of

[4] In fact, the State's Exhibit 2 even bears the legend, "Includes those released without having been formally charged." App., 60; 399 F.Supp. at 1315, J.S. at A23.

[5] See *Schware* v. *Board of Bar Examiners* (1957) 353 U.S. 232, 241-243.

course, that the convictions were duly shown to have been counselled, *Argersinger* v. *Hamlin* (1972) 407 U.S. 25, *Berry* v. *Cincinnati* (1973) 414 U.S. 29, for it is well-established law that the absence of counsel so vitiates "the very integrity of the fact-finding process," *Linkletter* v. *Walker* (1965) 381 U.S. 618, 639, that convictions not affirmatively shown to have been counselled, *Carnley* v. *Cochran* (1962) 369 U.S. 506, 516, cannot be tolerated as evidence of actual guilt, even for *collateral* purposes, see *Loper* v. *Beto* (1972) 405 U.S. 473, cf. *United States* v. *Tucker* (1972) 404 U.S. 443, and *Burgett* v. *Texas* (1967) 389 U.S. 109. Nor can the State's plaintive plea about the "administrative inconvenience" involved in sifting the actual convictions from its arrest tabulations, App., 46-47, 59, any longer pass Federal muster in Equal Protection litigation, *Reed* v. *Reed*, 404 U.S. at 76, *Stanley* v. *Illinois* 405 U.S. at 656, *Frontiero* v. *Richardson*, 411 U.S. at 688-691, and *Cleveland Board of Education* v. *LaFleur*, 414 U.S. at 646-648. Neither may a court of law take the raw arrest data and by some sort of a "judicial notice" approach simply guess at a magic percentage and suppose that the convictions are equal to the product of arrests times this "judicially-noticed" magic percentage, *Ohio Bell Telephone Co.* v. *Public Utilities Comm.* (1937) 301 U.S. 292.

In short, absent some tenuous type of "judicial notice," speculation, or outright guesswork, there was (and is) absolutely *no* basis in the instant Record (or more precisely, Exhibit 1) for any court to reach a quantitative conclusion as to the number of young males who *actually* committed some type of alcohol-related offense in Oklahoma in 1973. Nor any basis for determining the number of such females. Therefore, under *any* theory of the law of evidence or of judicial review,

it was absolutely erroneous for the District Court even to have admitted the State's Exhibit 1 into evidence, let alone to have *concluded* therefrom, even in part, that young males are more objectionable in their response to alcohol than young females.

Let us now move to the next fatal defect in these "statistics," again using Exhibit 1 as our base example. Even *assuming* that the male arrests reflected therein *were* convictions, we still can't tell whether they depict a greater male than female malinvolvement with alcohol for the simple reason there is absolutely *no* elucidation in this (or any other) Exhibit that the arrests even necessarily relate to *different individuals*. That is, adding up (from 399 F.Supp. at 1314, J.S. A22) the figures of 152+107+168=427 (18-21 year old male DWI's), and maybe adding thereto 340+321+305=966 (18-21 year old male Public Drunks), for a total of 1,393 male alcohol-related arrests in Oklahoma in 1973, does this latter "datum" mean that 1,393 young men got arrested *one* time apiece in 1973? Or that 139.3 young men got arrested *ten* times apiece? Or simply that *one* male on a perpetual drunk throughout 1973 got himself arrested therefor 1,393 times? Since the Exhibit doesn't enlighten us, we can either just take a wild guess, as apparently the District Court did, or, we can simply *admit* that we just don't know and can't determine the crucial datum of how many *individual* young males (or females) actually were arrested in 1973. Failing that, there is likewise no basis, other than by rank supposition, for concluding that there were necessarily even *more* individual males at all than individual females so arrested that year.

But passing over these threshold problems, the next pitfall in considering the materiality of these "data"

is that they do not even disclose whether the arrests in question derive from consumption of the precise beverage actually in issue herein, to wit: 3.2% beer (as opposed to the stronger liquors). That is, since Oklahoma's age-sex discrimination relates *only* to alcohol in concentrations of 3.2% or less, with *no* sexual discriminations regarding alcohol in higher concentrations,[5.5] the "factual" justification for such a scheme must necessarily be that there indeed do exist data which factually demonstrate (1) a *different* male-female response to alcohol in concentrations of 3.2% or less, and (2) an *identical* male-female response to alcohol in concentrations greater than 3.2%. So, the question is, is there anything in Exhibit 1 (or elsewhere herein) that indicates that the arrest data relied on derive exclusively (or even primarily) from the assertedly sexually-differentiable 3.2% beverages, and do *not* derive from the assertedly sexually-neutral stronger ones? No. So far as Exhibit 1 and the others disclose, *all* the arrests might just as easily derive from the "hard" liquor as from the 3.2% variety. In fact, the *legal* presumption *must* be that the arrests disclosed in the State's Exhibits 1 et al. *do* relate exclusively to "hard" liquor, for *only* those actually *intoxicate*, the lesser 3.2% variety having been found by both Legislature and People of Oklahoma to be *non*-intoxicating, 37 O.S. 1971, Sec. 163.1, and judicially determined to mean just exactly that in *State ex rel. Springer* v. *Bliss* (1947) 199 Okla. 198, 185 P.2d 220.[6] If, indeed, any of these arrests do derive from 3.2% beer, it is most probably the

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[5.5]For "intoxicating" liquors, i.e., those with more than 3.2% alcohol, the age is 21 for both sexes. Okla. Const., Art. XXVII, Sec. 5 (1959); 37 O.S. 1971, Sec. 537(a)(1).

[6]See fn. 1, supra, p. 7.

female arrests depicted that do so, since, due to the "natural and proper timidity and delicacy" of their sex, see *Bradwell* v. *Illinois* (1873) 16 Wall. 130, 141 (concurring opinion), it is the girls who would be the ones most likely to opt for the softer refreshment. [Nor does the reference to "beer" in the State's Exhibit 3 disturb the foregoing analysis, as that Exhibit likewise makes no indication whether the "beer" referred to therein is the 3.2% variety, or the stronger type.]

But *assuming* the initial difficulties, that arrests equal convictions, that each conviction was of a different male, and that all these 1,393 instances of demonstrated drunkenness derived exclusively from 3.2% beer, let us now move into an area where "statistics" can start proving truly insidious. Let us concentrate on the DWI statistics[7] of our Exhibit 1: 427 for the young men, versus only 14+2+8=24 for the young women. By ignoring all the previous difficulties, do we not then "show" that young males are clearly more dangerous in their DWI propensities than young women? Not necessarily. We can't be sure, because we don't know and haven't been told, how much actual driving young men do in comparison to young women. The seeming driving-while-*intoxicated* "imbalance" might very well be in direct proportion to the basic male-female *driving* imbalance. For example, if some statute allowed females to get hunting licenses at age 18, but prohibited males therefrom till 21, and the basis asserted therefor was a greater male "recklessness" surfacing in the gun-and-outdoors environment, certainly we would not be satisfied as to the factual existence of such a greater male "recklessness" merely by having our attention invited to data

[7]The Record herein is devoid of any indication whether Curtis Craig is possessed or either automobile or driver's license.

disclosing that an infinitely greater number of 18-21 year old male infantrymen suffered gunshot wounds in Vietnam than such 18-21 year old female infantrymen, since an equally logical explanation of such a statistical imbalance might be that there were just more young male infantrymen in Vietnam to get injured than like-aged female ones. Or, to take an example somewhat closer to the evidence herein, say, regarding the mere traffic injury data of the State's Exhibits 4 and 5 (399 F.Supp. 1320-1, J.S. A30-31), let us assume that men are involved in ten times as many accidents as women, but do *twenty* times as much driving as women. It might be technically accurate, then, to say that men cause ten times as many accidents as women (assuming "are involved in" means "cause"), but a more truthful analysis would obviously be that men as drivers are only *half* as reckless women.

So to get back to the seeming male-female DWI "imbalance" of Exhibit 1, does that "imbalance" show that the "average" young man is any greater a DWI risk than the young woman? The answer is, we simply can't tell from the Exhibit, since the underlying male-female *driving* (whether intoxicated or not) proportion is not stated. *Some* indication of this latter datum however, might be indirectly gleaned from the State's Exhibits 3 and 8. In Exhibit 3, the "Omec" study, which purports to be the tabulated result of a random roadside survey conducted in Oklahoma City in 1972 and 1973, as part of Table 3 thereof, 399 F.Supp. at 1316, J.S. A25, we see, under "Number of Participants," 243 + 238 = 481 males under 20 polled during 1972 and '73, respectively, as against only 70+68=138 like-aged young women in the same years. So, if this assertedly random roadside sampling is an indication of the sexual proportions of drivers actually on the road, it would appear that about 78% of the drivers under 20 are male. And in Exhibit 8,

the Federal study, App., 209-210, it appears that the percentage of female-driven vehicles drops from around 26% during daylight to a minuscule 6 percent at night. But this does not tell the whole story, for the *individual* (or "average") male driver appears to drive considerably more each year than the female, as tabulated in the just-cited Table 1 to the Omec study, 399 F.Supp. at 1316, J.S. A25, where we see, under "Average Miles Driven," 15,670 + 16,794 = 32,464 miles for males under 20 in 1972-3, as opposed to 10,471 + 10,456 = 20,927 miles for females under 20 in the same years, or a ratio of more than one and a half times as much driving per individual (or "average") male than female. And from the text of these studies, see paragraph 1, 399 F.Supp at 1315, J.S. A24, it would also appear that these data do *not* include commercial and industrial vehicles, which certainly constitute a significant percentage of the total, have greater annual mileages, and which are almost totally male-driven. Thus, while it is impossible to derive a precise figure from the State's vague data herein, it would appear fair to say that men do *at least* 90 per cent of the overall driving in this Country, or at any rate, so much as to render the *seeming* DWI "imbalance" of Exhibit 1 totally unreliable as a basis for sustaining a legal inference that the average male driver presents any especially graver DWI threat than the average female driver.

So much, then, for the slippery questions subsumed usually under the heading of "weighted" versus "unweighted" averages. Let us now move from the insidious to the truly treacherous, and take a cold, hard look at the basic integrity and even *honesty* of these statistics, and ask ourselves whether they were even *gathered* in a fair manner. Let us take the example of the *third*

category of the "statistics" in Exhibit 1 (and 2), which after due reflection the District Court deemed it more prudent *not* to reproduce in its opinion, namely, "Liquor Laws" (contained on Exhibits 1 and 2, and testified to at App., 52-53, 59-60). This "Liquor Laws" heading was a "catch-all," App., 53, 59, that included *everything* that was neither Public Drunk nor DWI, and specifically included the "working-in-a-beer-joint-by-a-minor" law, 37 O.S. 1971, Sec. 243, and assorted municipal "possession-of-beer-by-a-minor" ordinances — wherein "minors" are *defined* as males under 21 and females under 18, so that when females 18, 19 and 20 possessed beer or worked in bars, such occurrences did *not* end up in the tabulations as violations, but when males 18, 19 and 20 possessed beer or worked in bars, they *did*. App., 54-55, 60-61. *Naturally* there would be more "violations" under "Liquor Laws" for the young men than young women in such circumstances. And incredibly, the District Court below ruled this only went to the "weakening" of those lines of Exhibits 1 and 2, but not to their admissibility! App., 55. Appellants *strenuously* urge that the admission of such an exhibit was constitutional as well as legal error of the highest order, error so gross, Appellants urge again, as to cast the gravest doubt on the validity of *all* the District Court's rulings on and treatment of the State's exhibits. And, while the District Court later *did* omit any reference to these "Liquor Laws" items in its published opinion, the fact that though "weakened" they were still *admitted* constitutes *per* se a "reasonable possibility that the evidence complained of might have contributed" to the decision, *Fahy* v. *Connecticut* (1963) 375 U.S. 85, 86-7, cf. *Chapman* v. *California* (1967) 386 U.S. 18, 22-24.

Mathematically speaking, the error ("fallacy") of the "Liquor Laws" exhibits is known as "assuming that

which was to be proven." Thus, let us say, we are to prove that discriminating between males and females 18-21 for liquor is constitutional. To establish that (according to the District Court's reasoning), we need only prove factually that males and females 18-21 react differently to alcohol. The specific basis selected to prove this is to show that more males than females 18-21 commit alcohol-related offenses. Chosen to prove that are the two specific offenses of "possession of beer by a minor" and "working in a bar by a minor," and sure enough, we find *lots* more males 18-21 committing *these* two particular offenses than females 18-21. Therefore, Q.E.D., the statutory discrimination is valid? *Wrong*. The fallacy occurs when the specific offenses of "possession by a *minor*" and "working by a *minor*" are selected as representative of showing more 18-21 male violations of *general* liquor offenses than female, because the statistics reflecting the arrests for these "minor" offenses are "stacked" against the male 18-21 by those offenses' very *definition* of "minors," although it was the validity of *precisely* that definition of "minors" that was *thereafter* to be proven from the *initial* raw data. As stated, to "prove" the validity of a questioned statute by evidence *generated* (or "stacked") by the very *pre*-existence of the statute which in contemplation of the Constitution *could* not pre-exist without some contemporaneously pre-existing factual basis as well, is precisely to "prove" the statute's validity through the fruits of a pre-assumption of its validity. A racial analogy might be to enact a law denying some ethnic group meaningful educational opportunities, thereby blighting the group's children's intellectual and academic development, then compiling "statistics" showing the group's "deficit" in scholastic achievement, and then using that deficit as a basis for perpetuating the statute. One truly wonders

how far the State might have gotten in defending, with the District Court's rationale, Oklahoma's former *criminal* age-sex discrimination, 10 O.S. 1971, Sec. 1101(a), discussed supra, pp. 8-10, 11, and later voided in *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, if instead of urging "the demonstrated facts of life," the State would have adduced "statistics" showing that within the 16 and 17 year old age group, the boys were committing "crimes," but girls were only committing mere "acts of delinquency." Surely the Tenth Circuit would not have overruled an objection to such "data" as going merely to the "weakening" but not the *admissibility* thereof to show a greater teenaged male than female "crime" rate sufficient to retain the antecedent scheme of prosecuting boys as felons at 16, while continuing to process girls as mere delinquents till 18.

Let us next consider the "stacking" of the data herein by means a little more subtle or covert than by an express statutory mandate. Take, for example, the typical police attitude of "selectively" singling out the youthful male for disproportionately closer scrutiny and harsher enforcement of various laws. This very prejudice itself (in the original sense of "*praejudicium*") inevitably leads to a self-perpetuating vicious cycle based on "assuming that which was to be proven," as follows: the police [first] *assume* that young males as a class are "rowdy" and deserving therefor of a little extra surveillance and strictness — which is naturally interpreted by the youths as harrassment — which leads to confrontations — then arrests — which then provide the "statistics" which reinforce and reperpetuate the community's prejudice that young males are as a class "naturally" rowdy, and therefore require the imposition of specialized statutory penalties just on them. A racial

analogy might be a higher "vagrancy" arrest rate for Negroes than for Caucasians in some backwoods Mississippi crossroads; but rather than proving an innate Negro "shiftlessness," such arrest would far more likely just reflect a prejudice by the local police that since Negores are in fact *already* more "shiftless" than Caucasians, they therefore just need a little more arresting for it.

Or, to take an example of police prejudice reflected by the very statute at bar, let us briefly follow a couple comprised of a similarly-situated young man and young woman 18-21. The young man, thirsting for some refreshing 3.2% beer, invites his girlfriend out. He drives her to the Honk and Holler, where the girlfriend goes in and purchases the twain's beer. Because of social convention the young man then drives himself, girlfriend and beer to some pastoral locale, where the twain then consummates its bacchic rites, to include an injudicious overindulgence in the beer (on a non-discriminatory basis). But on returning his girlfriend home, the young man somehow attracts a patrolman's curiosity. The young man is routinely arrested, but the girl is simply told to get on home (or else is chivalrously taken there by the officer himself).

Actually *proving* prejudice in the "stacking" of law-enforcement data is, of course, an imprecise science. However, Oklahoma itself has openly acknowledged the existence of "selective" law enforcement in the State, see *Hayes* v. *Municipal Court* (Okla.Cr., 1971) 487 P.2d 974, 980, and no one would dispute the fact that the "public drunk" and related laws are now fulfilling the same "catch-all" and "selective enforcement" traps formerly afforded by the "vagrancy" and the "loitering" laws, *Papachristou* v. *Jacksonville* (1972) 405 U.S. 156,

168-171, *Hayes* v. *Municipal Court*, supra. Nor can there be any doubt as to Oklahoma's past discriminatory policies of singling out youthful males for selectively oppressive punishment: these policies were institutionalized for decades in 10 O.S. 1971, Sec. 1101(a), discussed supra, pp. 8-10, 11. Given these uncontroverted facts, then, how can *any* credence be placed on the statistical "differentiation" allegedly disclosed by the State's arrest data? They obviously reflect nothing more than local police practices in arresting young males more often than young females, for the same offenses, because of a self-perpetuating "sugar and spice" mythology.

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Before continuing with this general discussion of discriminatory statistics, let us quickly review the State's other exhibits. Exhibit 2 was the Oklahoma City version of the State-wide Exhibit 1, and need not be discussed in detail, other than to note that to some undetermined degree Exhibit 2's data are probably included in Exhibit 1's. Exhibit 3, the "Omec" study, was the roadside survey referred to supra, pp. 27-28. One initial defect of this Exhibit is its broad categories of persons "Less Than 20 Years." Since both sexes can get driver's licenses at 16 in Oklahoma, 47 O.S. 1971, Sec. 6-103(1), it is evident that this "under 20" category must include persons 16, 17, 18 and 19 years of age, while the discrimination at bar relates only to persons 18, 19 and 20. For anything disclosed in Exhibit 3, *all* of its "under 20" examinees could have been only 16 and 17. Its Table 1, 399 F.Supp. at 1316, J.S. A25, curiously reflects rather *similar* drinking habits for young males and females, and it reveals only *two* young persons, male or female, that in both years together had a blood-alcohol content high enough (.10 and .11 per cent) to be deemed "under the influence" by Oklahoma's standard (of .10%, 47 O.S.

1975 Supp., Sec. 756(c)), far too slight a sampling to extrapolate any meaningful inferences therefrom.

Exhibits 4 and 5 were traffic accident data for 1972 and 1973 in Oklahoma (published, respectively, the following years). A higher male than female casualty rate is disclosed for both drivers and passengers, but these data too are totally worthless for the purposes at bar since they do not disclose *alcohol* involvement vel non, nor even the basic *fault* in the accidents, which could very well have been due in most or all instances to the *other* drivers (e.g., the "typical woman driver," possibly a young one with several 3.2% beers too many?). Also inhering in these data is, again, the problem of not knowing the ratio of actual driving done by males as opposed to females, thereby leaving us wholly unable to evaluate whether or not the seeming male/female injuries "imbalance" actually implies any higher male propensity for "recklessness" and the like. Appellants are further astonished that the District Court deemed the higher male *passenger* injury rate worthy of consideration and citation in support of the discrimination at bar. 399 F.Supp. at 1309-10, J.S., A10-11. *That* statistic could very well derive from the men's having let their wives or girlfriends do the driving.

Exhibit 6, App., 182-184, contains FBI compilations of Nation-wide arrest data for 1972 and arrest trends over 1967-1972, for the categories of DWI, Liquor Laws, and Public Drunk, therefor constituting the Nationwide version of Exhibits 1 and 2 for Oklahoma and Oklahoma City, and therefore also subject to the same criticisms. Exhibit 7, App., 185-207, was a conglomeration of charts and tabulations for the DWI problem in Minnesota during 1971, offered as cumulative to the Oklahoma data, which it was, and likewise subject to essentially the same

objections. Exhibit 8, App., 208-227, was an HEW compilation of again similar data.

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Refocussing our attention back on Exhibit 1 now, let us at this point accept as valid the 1,393 arrests of males 18-21 versus 126 of females. This seeming 11-to-1 imbalance looks truly awesome, doesn't it? Well, once again, not necessarily. Accepting those figures as absolute truth, and then taking the data from the 1970 Census, App., 178, of 69,688 males 18-21 year old males in Oklahoma, and 68,507 such females, we see that the young male drunkenness percentage is about 2.00% (1,393 arrests ÷ 69,688 males 18-21), and the female figure 0.18% (126 arrests ÷ 68,507 females 18-21), or roughly the 11-to-1 ratio previously noted — but an alternative way of expressing these *identical* data is that the male *non*-drunkenness ratio is 98.00%, versus the female *non*-drunkenness ratio of 99.82%, which is another way of stating, and from the State's own evidence, that the male-female *sobriety* ratios differ by *less than two percent!* Indeed, with but a slight juggling of the State's figures, we see that for the offense of DWI, there were *more* young men *non*-DWI (69,688 − 427 DWI arrests = 69,261) than young women non-DWI (68,507 − 24 DWI arrests = 68,483), and likewise more *non*-Publicly Drunk young men (69,688 − 966 Public Drunk arrests = 68,722) than non-Publicly-Drunk young women (68,507 − 102 Public Drunk arrests = 68,405). The superiority of the male over the female for these two activities can be expressed as ratios, of 1.01 for DWI (69,261 non-DWI males ÷ 68,483 non-DWI females), and 1.005 for Public Drunk (68,722 non-Publicly-Drunk males ÷ 68,405 non-Publicly-Drunk females), which when converted to percentages reveal the young male to be 101% more reliable in the

DWI context than the female, and 100.5% more reliable regarding Public Drunkenness.

So, from *identical* raw figures we have, with minimal juggling and manipulation, "proven" three absolutely contradictory revelations about young males' and females' response(s) to alcohol: (1) that the male gets about 11 times drunker than the female; (2) that the sobriety rate differential between the sexes is so slight as to be negligible, and (3) that the male is over 100% more reliable with alcohol than the female! This very fact, that from one set of raw data we can readily "prove" that males are inferior to females, equal to females, and superior to females in their capacity to handle alcohol, *actually* proves something quite different, namely, that there is absolutely *nothing* that cannot *somehow* be "proven" with "statistics." Indeed, the very use of "statistics" as just demonstrated herein fully verifies the observation of Disraeli, that "There are three kinds of lies: lies, damned lies, and statistics."[8] And, if with "statistics" juggled about like those at bar the District Court could accept as "proven" the legal as well as the factual "inferiority" of the White, adult, male, Protestant Anglo-Saxon Appellant Curtis Craig herein, then *whose* Equality can ever be safe in this Country?!!

But to continue with the puzzle at bar: which of the three proffered jugglings of the basic data herein reflect the "truth"? Just to show *we* aren't cheating, let us confine our ensuing discussion to the 11-or-so-to-1 drunkenness ratio of Oklahoma's young adulthood (of 2.00% for the males and .18% for the females), and the less-than-two-percent-differential *non*-drunkenness ratios

[8]Quoted on the frontispiece of an enlightening little monograph entitled *How to Lie with Statistics*, by Darrell Huff, W. W. Norton & Co., Inc., New York, 1954.

(of 98.00%, male, vs. 99.82%, female). With the one, there might appear to be some arguable difference in alcohol response; with the other, obviously not. [The racial analogy might be in a community of 100,00 Caucasians and 100,000 Negroes, wherein no Caucasians and ten Negroes are arrested for "vagrancy" in some given year. Which "statistic" tells us the truth about Negro "shiftlessness" — the datum that the Negro shiftlessness rate is "infinitely" (i.e., ten divided by zero) greater than the Caucasian? Or that the Black-White *non*-shiftlessness ratios are virtually *identical*?]

Appellants submit that choosing between "drunk vs. non-drunk," or "shiftless vs. non-shiftless" is an erroneous posing of the alternative(s). The proper question, when we are considering the "stereotyping" of a certain group so as to justify a *conclusive* inference, from so many of the members of the group suffering some deleterious propensity, that membership in the group is *per se* a valid basis for the collective denial of some entitlement enjoyed by others, is simply whether the stereotype advanced is *factually true*, which means: is in actual fact the deleterious propensity truly so universally common among all the members of a certain group as to render rational, under the relevant constitutional standard, a conclusive presumption that any single, randomly-selected individual member of the group must surely himself exhibit his group's common failing as well?[9]

Or, alternatively, is the deleterious propensity *not* so widespread among all the members of the group as to

[9]An alternative formulation stating the same thing would be whether the deleterious propensity is in fact so widespread throughout the group that the probability of any single, randomly-selected individual member of the group *not* displaying the propensity would be neglible.

render rational (in the constitutional sense) the conclusive presumption that any single, randomly-selected individual member of the group would necessarily exhibit the said propensity himself?

Therefore, the way to answer the question of choosing the "deleterious" versus the "non-deleterious" percentages as representative or characteristic is to determine which one of the two more fairly typifies the group *as a whole*, for it is the typification vel non of the group as a whole which is at issue in the stigmatization vel non of the group as a whole. Thus, if the deleterious quality can be shown by honest and competent statistics to be possessed by a *hundred* percent of the group, then the statutory categorization of the entire group would make some degree of common sense. As the percentage of group members actually suffering the deleterious propensity begins to drop below 100%, however, we start getting increasingly uneasy about the *en masse* stigmatization, for common sense tells us we are hurting an ever-expanding proportion of *innocent* individuals not *in fact* displaying the characteristic. At a point *no later than* when the percentage of group members displaying the characteristic in question drops below 50% the voice of conscience tells us that it is the *non*-deleterious percentage that must now dictate our view of the group, since as a factual matter it is the *non*-deleterious majority that now more truly represents the group as a whole, which "as a whole" characteristic is the sole legitimate justification for any *conclusive* categorization of a group.

So, in determining whether it is the seeming 11-to-1 male-female drunkenness inbalance, or the $\pm$1.82% *non*-drunkenness differential which more fairly reflects the alcohol response of Oklahoma's young adulthood, we

merely examine which datum more widely applies to the subject population was a whole. In this case, the 11-to-1 figure applies to .18% of the female and 2.00% of the male population 18-21, or about 1.09% of the total; whereas the $\pm$1.82% figure applies to 99.82% of the female and 98.00% of the male population, or about 98.91% of the total. Obviously, the $\pm$1.82% differential figure better reflects the situation as the whole, just as, to restrict our view to just the males, the 98% sobers represent their sex far more accurately than do the 2% drunks.

This approach of not condemning the multitude for the sins of the few is reflected in the previous "permanent irrebutable presumption of fact" decisions by this Honorable Court. For instance, even though many, perhaps "most" (i.e., more than 2%) of unwed fathers may be unfit as parents, to condemn all unwed fathers as unfit was held irrational from the factual viewpoint in *Stanley* v. *Illinois* (1972) 405 U.S. 645, 654. The percentage of Servicewomen *not* their families' breadwinners does not appear in the *Frontiero* v. *Richardson* decision, 411 U.S. 677 (1973), but again it was surely in excess of the instant 2%. Likewise with the proportion of women in their last trimester of pregnancy: not all are physically incapacitated, but clearly more than 2% are. *Cleveland Board of Education* v. *LaFleur* (1974) 414 U.S. 632, *Turner* v. *Dept. of Employment* (1975) ____ U.S. ____, 46 L.Ed.2d 181, 96 S.Ct. 249. Even where it was a percentage *differential* between male and female (rather than a portion out of one or the other) that was in issue, *Reed* v. *Reed* (1971) 404 U.S. 71 struck down a statute premised on the fact that women may generally be somewhat less educated or experienced than men to some unstated degree (but still more than $\pm$1.82%). Compare *Leary* v. *United States* (1969) 395 U.S. 6, Part II of which invalidated a statutory

presumption that all marijuana is imported in view of the "significant percentage," id., at 46, (surely > 2%) that is domestic.

Clearly, therefore, our "statistical" view of the male sex's ability to handle alcohol must be governed by its 98% sobriety rate; and our view of the male-female response differential must likewise be governed by the ±1.82% datum.

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The essential fallacy underlying this whole "statistical" approach, as a matter of fact as well as of law, lies in the illusion it creates of an "average" male or female. But human beings are not "continuous" or fungible; they are "quantized" as individuals. There is absolutely *no* basis for saying that any *one* male, or female, possesses a particular characteristic, or even possesses it to any set degree, simply because of some percentage of other individuals that may possess that quality — at least not until the percentage approaches 100%, or what is known as a "direct" or a "one-to-one" relationship.[10] This point can be exemplified by the very datums we have been discussing: they do *not* mean that any *individual* male, upon drinking an equal amount of alcohol with a female, is going to end up 1.82% less sober than the female, any more than that an individual male consuming an equal amount of alcohol will end up *eleven times* drunker than she! But misimpressions just like this often get formed when one talks of the "average" man or woman.[11]

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[10]For instance, it could be rational to presume (though certainly not *irrebutably*) that an individual man possesses a prostrate gland.

[11]The Galactic Ghoul's report that the "average" Earthling is "half male and half female" might help illustrate the point.

Ultimately, the entire "statistics" approach to discrimination becomes an argument by the proponents thereof that they are not really discriminating against the target race, sex, or whatever, as such, but against some deleterious characteristic said to be possessed by the target group, and that membership in that group is merely an "index" of the individual group-member's high probability of exhibiting that characteristic. Thus, in the *Stell* v. *Savannah-Chatham* litigation discussed ante, pp. 18-19, the segregationists made the ostensible claim that they were not segregating Negroes *qua* Negroes, but that "uneducability" was what actually was being segregated, with the Negroes' race as merely the (or an) "index" thereof. Id., 220 F.Supp. at 668, But, whenever a "less drastic alternative" to determining "uneducability" is proposed, see *Dunn* v. *Blumstein* (1972) 405 U.S. 330, 343, such as the administration of say, some impartial and racially-neutral examination to determine such "uneducability" of a particular, individual Negro before relegating him off the "slow" school track, the discriminators' response invariably degenerates into some sort of an "administrative inconvenience" plea, that the individualized test proposed would be "impractical" to give, and that the individual's ethnicity must be retained as the criterion because of the superior bureaucratic ease and efficiency in administering same. Of course, whenever we hear *that* argument, we *know* we're listening to double-talk.

So too with the situation at bar. The only conceivable defense to the instant discrimination at bar is that it does not discriminate against males as such, but rather it discriminates against alcoholic irresponsibility by certain members of Oklahoma's young adulthood, and merely uses the individual young adult's sex as the index

of that irresponsibility. But if that is the reason for the discrimination, would it not make far better sense, as well as better justice (say under the "less drastic alternative" doctrine) to administer some type of individualized, sexually-neutral testing to determine this alcoholic irresponsibility? And would not such an individualized program, in addition to lifting the unfair burden to the *responsible* 98% of the male sex, also enhance the asserted public policy by identifying the *ir*responsible *females* (who can presently purchase 3.2% beer in unrestricted amounts) and thereby drying up that hithertouncontrolled female irresponsibility? Well, yes, but, no, the State tells us, because (surprise!) the inconvenience in administering such a fair, just, sensible and basic-policy-furthering program might tend to be bothersome to the bureaucracy. 399 F.Supp. at 1313, J.S. A18-19.[12] The discrimination at bar therefore justifies itself in

[12]Such a sexually-neutral test might simply be for the young adult to present himself at any local law-enforcement agency having a "drunkometer" device, consuming within a fixed time a number of cans of 3.2% beverage corresponding to his body weight, and then testing on the breathalyzer his result blood-alcohol concentration. If it's under a certain level, he passes, and the agency certifies the results to the highway department (Department of Public Safety) for placing a "3.2% endorsement" on his driver's license. The Department would be the logical agency to handle such a program, as it already has the mechanism for administering large numbers of tests and license-issuances; it would also be the logical choice as driver's licenses are universally used as ID cards in Oklahoma, and also because the DWI danger is the chief asserted concern over the young drinking adult. A further advantage to doing this through the Department would be its means for handling revocations as well (as is presently done in the case of DWI's). This may not be the most accurate testing program possible, but as a "less drastic alternative" to the present discrimination it does not appear so intolerably "burdensome" as the State would have us believe.

the final analysis not by pretending to be the *accurate* way to predict the young adult's response to alcohol, but rather, just the *easy* way.

This revelation, taken with the State's frank concession that data equivalent to those adduced herein in the ethnic context would clearly not suffice to justify an age-*racial* discrimination like that at bar, App. 97-98,[13] adequately disposes of whatever else might remain of the "statistics" herein.

PROPOSITION III

THE DISCRIMINATION AT BAR ABSOLUTELY FAILS TO SATISFY EVEN THE MINIMAL CRITERIA OF THE TRADITIONAL TEST FOR MERE RATIONALITY.

Statistics aside, the instant discrimination clearly fails to satisfy even the most minimal of traditional Equal Protection tests, namely, that of the "rational relationship."

Under the first criterion of this test, it is not sufficient for validity that the statute discriminate between two groups that are "different." By definition, *any* two groups will somehow be different, and certainly males and females are "different." The legal question is not, therefore, mere "difference," but whether the two groups are "similarly circumstanced," see *Reed* v. *Reed* (1971) 404 U.S. 71, 76, and by that is meant whether they are similarly circumstanced with respect to the particular legislative policy asserted to be the basis for the discrimination.

[13]This concession does not mean, of course, that data revealing ethnic (and religious) differentiations with respect to alcohol response do not exist. See App., 209.

While the *real* purpose for the discrimination at bar is theological, see ante, pp. 5-6, 11, let us posit what necessarily has to be its asserted purpose, namely, to deny access to 3.2% beer to those members of the 18-21 year old age bracket who behave irresponsibly with respect to alcohol. The means employed to achieve that end is our discrimination of allowing all females but no males in the said age bracket to purchase 3.2% beer. The factual basis underlying the choice of the sexual determiner as the mechanism for identifying the irresponsible members of the State's young adulthood is declared to be that 99+% of the female members thereof appear to display the desired responsibility with respect to alcohol, as opposed to "only" 98% of the males. *Assuming* all the foregoing to be true, let us now apply the "similarly circumstanced" test with respect to the following three pairings of young males and females.

1. Responsible males and responsible females. This category includes, as stated, 98% of the males and some 99% of the females. If the purpose for the discrimination is declared to be to bar irresponsible young adults from 3.2% beer, then the responsible males and the responsible females are clearly "similarly circumstanced" with respect to that objective, since, by definition, the individual members of *both* sexes in this category are responsible, whereas the discrimination is declared to be a means of getting at only the irresponsible young adults. Since, however, the discrimination treats *dis*similarly males and females who obviously are similarly circumstanced with respect to the asserted purpose for the discrimination, the discrimination is therefore "irrational" with respect to the males in this "responsible" category.

2. Irresponsible males and irresponsible females. This category comprises at best but a tiny minority of either sex, but the State maintains that these minuscule minorities do exist. If, then, the purpose for the discrimination is again declared to be to bar irresponsible young adults from 3.2% beer, then the irresponsible males and the irresponsible females too are clearly "similarly circumstanced" with respect to that objective, since, by definition, both sexes in this category are irresponsible, and the discrimination is declared to be a means at getting at such irresponsible young adults. But again, however, the discrimination treats *dis*similarly males and females who obviously are similarly circumstanced with respect to the asserted purpose for the discrimination. The discrimination is for this category "irrational" also.

3. Responsible males and irresponsible females. This pairing presents the ultimate absurdity. If we indulge the fiction that the purpose of the statute is a roundabout way of saying *ir*responsible young adults should not have access to 3.2% beer, then the responsible males and irresponsible females herein are *not* "similarly situated" all right. But the statute in this circumstance yields a result just exactly the *opposite* to the statute's asserted purpose. It is difficult to conceive of a situation more clearly demonstrative of *any* statute's irrationality.

Next let us consider whether the statute is even *effective* in relationship to its intended (or asserted) purpose, for if the statute is not serving any useful function other than to insult Oklahoma's young manhood, its continued existence becomes irrational as a matter of law.

Assuming once again the asserted syllogism that the statute is not directed at males *qua* males, but at youthful alcoholic irresponsibility, and that legislating against males is just a "paraphrase" for legislating against this target irresponsibility, assuming all that, does this statutory scheme even so much as *pretend* to accomplish

its asserted goal? Absolutely not. The statutes, taken together (generally, 37 Okla.Stat., Ch. 2), do *not* prohibit the young man from *acquiring* or *possessing* 3.2% beer, or for that matter even *consuming* it. Indeed, by the very wording of Section 241 *parents* may furnish it to their young adult sons absolutely without restriction as to amount, time, or place.[14]

In fact, the *only* expressly stated *prohibition* in the statutes is limited solely to *sales* by *licensed vendors.* 37 O.S. 1971, Sec. 163.11(3), 217, 242, and 244. There is therefore absolutely *no* sanction imposed against, say, the young man's older brother, younger sister, or *anyone* else (than a licensed vendor) furnishing him his beer in whatever amounts he may desire. In the campus context of the instant case, all our instant young Appellant needs to legally consume 3.2% in unlimited quantities is his *girlfriend* (to run in and get it for him)![15]

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[14] Which might raise an Equal Protection problem in itself, between young adult men having "strict" parents versus those with "indulgent" parents; is there some theory for thinking that sons of "indulgent" parents are more trustworthy with 3.2% beer than sons of "strict" ones?

[15] This very fact has led to some satirical comment that the discrimination in question derives its continued vitality not so much from a Fundamentalist as from a *matriarchist* conspiracy: comprised of middle-aged mothers with an overabundance of comely daughters of the nubile ages who would have but scanty prospects for "dates" without the discrimination in question, but whose prospects therefor are being materially enhanced by their legal monopoly amongst 18-21 year olds for the purchase of beer, and because of which statutorily-vested monopoly the thirsty young men of the same age group have no choice but to invite said comely girls out, so that they (the girls) can *inter alia* purchase the very beer which will in turn further materially enhance their mating prospects.

Thus, the statutory discrimination at bar, while a humiliating annoyance, actually achieves nothing more than requiring the young man to accomplish his beer-buying in *two* steps (i.e., by using an intermediary), whereas the young woman is permitted to accomplish hers in *one* (herself). As the State's own data herein might tend to suggest, this insulting but insubstantial alternative "pathway" to be traversed by the young man in his quest for his 3.2% beer does not appear to be enjoying any conspicuous degree of success towards its asserted goal of cutting down on youthful alcoholism, male or female. It is in actual fact totally ineffective for any purpose, other than, of course, to stigmatize the young male with the State's "badge of inferiority," cf. *Jones* v. *Alfred H. Mayer Co.* (1968) 392 U.S. 409, 439, 431, and *Brown* v. *Board of Education* (1954) 347 U.S. 483, 494.

The discrimination is therefore irrational in all senses, the traditional included, as it bears absolutely no true relationship towards its *asserted* goal.

PROPOSITION IV

THE JURIDICAL EQUALITY OF MALE AND FEMALE AMERICAN CITIZENS IS A POSITIVE RULE OF LAW; THE DISTRICT COURT THEREFORE ERRED IN EVEN ENTERTAINING THE STATE'S OFFER TO "DISPROVE" THIS JURIDICAL EQUALITY AS THOUGH IT WERE A MERE QUESTION OF FACT SUBJECT TO AN "EVIDENTIARY" ATTACK.

In the final analysis, law in any enlightened society must reflect truth. But in this imperfect world or ours, truth can never hope to be anything better than what

is *perceived* as truth, and in a democracy, the judiciary itself will ultimately reflect society's perception of truth. Therefore, as society's perceptions of truth evolve, so do the judiciary's, and the law pronounced thereby.

Decisions by this Honorable Court illustrate this evolution of law through changing social perceptions of truth. Taking race as an example, in an age when society believed that the aborigines of Africa were members of an inferior race, this Court rendered *Dred Scott* v. *Sandford* (1856) 19 How. 393, 407. Half a century later, the begrudging attitude that Negroes were educable, but only minimally, was reflected in *Plessy* v. *Ferguson* (1896) 163 U.S. 537; but as the Twentieth Century progressed in America, Nation and Court alike began to hold grave doubts as to the outlook of previous generations, as per *Shelley* v. *Kraemer* (1948) 334 U.S. 1. Finally, enlightened perception of the essential equality-in-fact of all Humanity's races was acknowledged by this Court in *Brown* v. *Board of Education* (1954) 347 U.S. 483, and within a decade therefrom this ultimate broadening in society's viewpoint had been transformed from a perception of fact to a positive rule of law, such that "evidentiary" attempts to "disprove" same were no longer even maintainable in the Federal Courts, as exemplified by the eventual outcome to the *Stell* v. *Savannah-Chatham* litigation, discussed ante, pp. 18-19, cf. *Loving* v. *Virginia* (1967) 388 U.S. 1, 8.

So generally with the sexual equality question too. In an age when muscle was the measure of a man, this Honorable Court reflected what society *thought* it "knew" about the 'other' sex's "weaknesses," *Bradwell* v. *Illinois* (1873) 16 Wall 130, *Cronin* v. *Adams* (1904) 192 U.S. 108, and so long as even enlightened opinion retained that view, so did the Court, *Muller* v. *Oregon*

(1908) 208 U.S. 412. Then, with the ratification of the Nineteenth Amendment (itself reflecting a change in society's perception of factual truth) came a period of uncertainty and vacillation; contrast *Adkins* v. *Children's Hospital* (1923) 261 U.S. 525, 552-3, with the ever-embarrassing *Goesaert* v. *Cleary* (1948) 335 U.S. 464.

The present era was ushered in by *Reed* v. *Reed* (1971) 404 U.S. 71, which was cautious in tone, announced no really new constitutional doctrine, listened to much evidence, but still made no express proclamation of fact. Since *Reed*, of course, both this Court and virtually all lower ones have grappled with numerous sexual inequalities in a variety of circumstances. The experience of the past half-decade, both in and out of court, teaches us that the sexes can be and indeed are vastly more equal in their innate capabilities than had previously been supposed, and as we have become more familiar with this area and seen how various equalizing statutes and decisions have worked out quite well in actual practice without the chaos that might have been feared, our suspicions of fact as to the essential equality of the sexes have been reflected legally as a presumption that the "typical" sexual discrimination is unjustified.

A suspected equality-in-fact, but as yet one heretofore unstated judicially. Perhaps "suspected" is already obsolete; "believed" would be a more accurate contemporary term, a belief growing into a faith of what the actual truth will eventually be perceived to be. But until judicially acknowledged, that undeniable equality-in-fact in the sexual context is not the positive rule of law it is in the racial.

The instant case, however, can serve to accomplish that transformation from fact to law quite well, for several reasons. One is, that there is a competent record

herein, fully reciting the unanimous opinion of modern science as to the equality-in-fact between the sexes. Second, this case poses a discrimination squarely in terms of the "inferiority" of the unfavored sex, unlike some other cases (e.g., Lt. Frontiero's difficulty in getting the allowance she sought was not because of any sentiment that female officers are less capable in their jobs than males).

But this case calls forth for the transformation from fact to law for a third, more compelling reason: the utter failure of the *State* to establish a true or innate differential between the sexes. To understand the significance of this, let us recall, as stated, that this discrimination squarely erects a presumption of inferiority. But this case has also been pending for over three, long years, in the *Frontiero - Reed* "handwriting-on-the-wall" era, within a Circuit that had already voided Oklahoma's criminal age-sex discrimination (*Lamb* v. *Brown*, 456 F.2d 18); and the State *has* made the "evidentiary" effort as a desperate means for avoiding the mandate in *Stanton* no doubt because the subject-matter of the discrimination at bar, *beer*, is an item uniquely calculated to evoke any State Attorney General's most vigorous efforts!

Despite all the warnings, however, the lengthy pendency of this case, and the obvious motivation incumbent upon the State to save this discrimination if no other, the State, as we have seen, has done no more than to put on a case which it *confessed* would be insufficient to salvage an age-*racial* discrimination! App., 97-98. The *scientific* portion of the State's case is conspicuous by its absence.[16] Hence, the "statistics," which as the

[16]Ironically, the Plaintiffs' Exhibit 2, App., 151-177, which experimentally refutes any male "inferiority" regarding alcohol, was produced at the State's own Oklahoma University Medical School.

State itself surely realizes have wholly failed to indicate the critical inferiority.

Let's face facts. If after all this time, warning, effort and motivation the State's sexual supremacists have been unable to make a case for sexual *in*equality-in-fact, that can only mean that the case for it just doesn't exist — and never did. Since "scientific sexism" has now had its day in court herein, and has been found lacking, and since no other litigants have come to this Court in the years since *Reed* and *Frontiero* with any other such attempt, we should without further delay forthrightly accept our perceived truth as established, and close out this era just preceding with the proclamation that sex equality having now become a positive rule of law, further burdenings of the Courts with "evidence" to "prove" the contrary will no longer be necessary (i.e., *allowed*). Recall again the ultimate outcome of the *Stell* v. *Savannah-Chatham* litigation, discussed earlier herein. Surely any doubt as to the wisdom of elevating sex-equality from the factual to the juridical can be resolved upon consideration of the spectre of *repeated* "Propositions II" becoming standard features in sex-equality litigation coming before this Court. In fact, to make the long-overdue announcement of sexual equality-in-fact's having attained "positive-rule-of-law" status might considerably ease the Court's sex discrimination caseload in general. To quote the late Senator Dirksen, "It is an idea whose time has come."

° ° °

While no rational man doubts the essential truthfulness of sexual equality-in-fact any more, neither can he be totally blind to the fact that there are organic differences between the sexes that have no analogy between the races. These may be fewer than previously

thought, and lesser in intensity, but they are evidently just enough to hinder sexual discriminations from becoming *totally* analogous to racial ones. Hence, sex is as yet still not quite as "suspect" as is race.

Counsel would be less than candid to urge that this case is the one to *force* resolution of "suspectness." This discrimination is clearly void under whatever test we might apply, suspect, rational, or *any*thing in between. But consider anyway: if race is suspect, and the only reason sex is not is because of the organic differences between the sexes that have no analogy between the races, then almost as by definition sexual discriminations between the sexes *not* founded on organic differences, such as the case at bar, *may* safely be termed suspect. Surely the time has come when sexual discriminations, such as ours, bearing *no* conceivable relationship to any differences between the sexes, and especially those framed squarely as "badges of inferiority," again like that at bar, should be decreed suspect with all available speed and minimum of deliberation. Indeed, not only would the ends of substantive justice be furthered thereby, such a suspect designation for *these* sexual discriminations would then leave the Courts considerably more time to ponder the truly troublesome ones. Certainly there is no need for relatively minor discriminations (to some extent like ours) dragging out for over three years up and down the ladder and around, when just one word would clear the air. Recall how the mandate in *Stanton* seems not to have gotten understood in this case! So pray, let us hear it.

° ° °

No Bicentennial Brief is complete without its mention of Equality, and perhaps that's where we should have started all this. It seems so simple that even a

school-boy can understand it. "The pledge of the protection *of equal laws*." *Yick Wo* v. *Hopkins* (1886) 118 U.S. at 369. What's fair for one is fair for all. What's sauce for the gander, etc. Does Equality mean Equality, or does it mean double-talk for something else? Whatever the Appellant Craig has gotten in this case, he has *not* gotten Equality! So back, for a moment, to the Declaration of Independence's Equality, bypassing the Fourteenth Amendment's for a moment. The Equality of the Founding Fathers was not posited on any assumed equality-in-fact between all individual citizens; it was the expression of a political equality of men before the law they themselves would make. That some might be wise, or some foolish, or some sober and others drunken, was (and is) immaterial: all were to derive the same benefit from their new creature, the American government. To tie juridical equality to individual merit would render equality absolutely unworkable, and surely we will not maintain that the Second Continental Congress could have been blind to such a truth. So if American political and legal equality applies despite *individual* inequalities-in-fact, there is absolutely no basis for denying it because of *collective* inequalities-in-fact either. Yet that is precisely what happened below. Given the District Court's reasoning, and the fact that males *over* 21 seem to have had a slight alcohol problem also, would the District Court have been just as willing to uphold a statute barring males from access to 3.2% beer to age 31, 51, or 101? Or barring males from access to alcohol altogether, all based on some minute collective inferiority-in-fact? It would seem *Goesaert* has come full cycle! Let us therefore conclude our inquiry into the question of the collective inequality-in-fact in the sex discrimination context with the following authority:

". . . an individual female cannot constitutionally be given more severe sentencing treatment for the same offense than that by law accorded males as a class on the basis of any characteristics thought *or even proved* to be applicable to females generally, or as to most of them.

"I would therefore join in the decision of the court *even if the record here justified the factual conclusion* that most female offenders, or female offenders generally, are better subjects for rehabilitation than males, or less recidivist, or that a longer period of detention would promote the chances for rehabilitation of female offenders generally as opposed to male offenders generally."

Conford, J., concurring specially in *State* v. *Chambers* (1973) 63 N.J. 287, 307 A.2d 78, at 85 (emphasis added).

Appellants respectfully urge that the foregoing concurrence be adopted by the Highest Court in the Land as the correct expression of the law applicable to the alleged situation at bar.

CONCLUSION

The 18/21 discrimination at bar would clearly be void were it age-*racial* (e.g., allowing Caucasians to purchase 3.2% beer at 18 but Negroes not till 21), or age-*religious* (Protestants at 18 and Catholics at 21), age-political (Republicans vs. Democrats), age-right-handed/lefthanded, or age-whatever, and certainly no less so simply because of some slight percentage differential that will *inevitably* exist between *any* two groups. The instant age-*sex* discrimination, obviously, is equally void.

WHEREFORE, premises considered, Appellants respectfully pray this Honorable Court to reverse the District Court's decision that 37 Okla.Stat 241, 245 is constitutional, and to remand this Cause to the District Court with instructions to issue appropriate writs of injunction to enjoin any and all further and future efforts and attempts at enforcing the prohibition contained therein against the sale of 3.2% alcoholic beverages to male persons 18 to 21 years of age.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Frederick P. Gilbert, a member of the Bar of this Honorable Court and counsel of record for the Appellants herein, do hereby certify that I served three copies of this Brief of Appellants upon counsel for all Appellees herein, to wit: upon the Hon. Larry Derryberry, Attorney General of the State of Oklahoma, by mailing the same to him at his office in the State Capitol Building, Oklahoma City, Oklahoma, Attn: Mr. James Gray, Assistant Attorney General, this 27th day of February, 1976, with first class postage thereon fully prepaid.

All Parties required to be served have been served.

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Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-628

CURTIS CRAIG and CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Appellants,

VERSUS

HONORABLE DAVID BOREN, Governor, State of Oklahoma, HONORABLE LARRY DERRYBERRY, Attorney General, State of Oklahoma, HONORABLE D. M. BERRY, Chairman, HONORABLE LAWTON L. LEININGER, Vice-Chairman, HONORABLE J. L. MERRILL, Secretary-Member, Oklahoma Tax Commission, HONORABLE RAY WALL, Presiding Judge, Ninth Judicial District Court, State of Oklahoma, HONORABLE CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma, HONORABLE ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma, HONORABLE FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma, and HONORABLE HILARY DRIGGS, Chief of Police, Stillwater, Oklahoma,
Appellees.

BRIEF OF APPELLEES

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April, 1976

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Appellees.

BRIEF OF APPELLEES

SUMMARY OF ARGUMENT

1. The trial court correctly applied the *Reed* v. *Reed*, 404 U.S. 71 (1971), test and found a rational basis based on criteria related to the subject matter for the classification found in 37 O.S. Supp. 1975, §§241 and 245.

2. The determination that the Oklahoma statutes at issue are not unconstitutional is fully supported by the presumption in favor of classifications rendered pursuant to the 21st Amendment as evidenced by *California* v. *LaRue*, 409 U.S. 109 (1972).

3. The decision of the trial court is not contrary to *Stanton* v. *Stanton*, 421 U.S. 7 (1975), and other similar decisions in that administrative inconvenience was not used as a basis for denying any substantive or procedural rights, neither were old and outdated archaic notions about differences between men and women indulged in.

4. The findings of fact supporting the rationality of legislation is fully supported by the evidence which is similar in scope and purpose to the statistics used by this Court in *Kahn* v. *Shevin*, 416 U.S. 351 (1974), and *Papachristou* v. *Jacksonville*, 405 U.S. 156 (1972).

5. The state's purpose in seeking to protect the persons affected and the public from the slaughter and property damage on the highways is a legitimate legislative goal and whether the legislation in question was the perfect or complete solution or not to this problem is not in issue. *Seagram and Sons* v. *Hostetter*, 384 U.S. 35, 50-51 (1966).

PROPOSITION I

THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE PROPER TEST OR STANDARD OF REVIEW WAS AS SET FORTH IN *REED* v. *REED*, 404 U.S. 71 (1971).

At the outset appellees would suggest to the Court that the trial court's judgment was basically in two parts: (1) the determination of the legal standard against which the Oklahoma statutes were to be compared, and (2) a review of the evidence to determine if the standard had been met.

The first part of this judgment is perhaps the most critical in that if this Court determines that some different standard should have been applied then appellees would request that this case be remanded at that point to give the appellees opportunity to present evidence under any such new standard.

Appellees, however, do not urge that the standard adopted by the trial court was in error, but quite the contrary, appellees urge that the test as enunciated in *Reed* v. *Reed, supra*, was the proper standard to apply. That portion of *Reed* v. *Reed, supra*, which the trial court determined set forth the standard to be applied is found at pages A6-A7 of the Jurisdictional Statement, 399 F.Supp., at 1308, which is reprinted here for convenience:

> "We feel that *Reed* v. *Reed*, 404 U.S. 71, provides the applicable test here. In *Reed* the Court stated, 404 U.S. at 75-76:
>
> 'In such situations, §15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

'In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (citations omitted) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).'"

The trial court was certainly not unaware of this Court's recent decisions of *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), but considered these decisions carefully and correctly noted that no new test was set out in these opinions and that no determination of "inherently suspect" classification was tagged onto sex-based classifications which then might have required a compelling state interest to be shown.

Without jumping ahead into Proposition II appellees would at this point direct the Court's attention to the legal conclusions which the trial court reached after having applied the evidence to the *Reed* test. These legal conclusions are found on pages A4-A5 of the Jurisdictional Statement, 399 F.Supp., at 1307, and are reprinted here for convenience:

"We uphold the Oklahoma statutes in question for three main reasons: (1) in this case, unlike some others in which the Supreme Court and other courts have invalidated sex-based classifications, proof was made in which we find a rational basis for the legislative judgment underlying the challenged classification; (2) the classification here is directly related to apparent legislative objectives, looking to protection of the persons affected and the public; and (3) the statutes in question concern the regulation of alcoholic beverages—an area where the States' police powers are strengthened by the Twenty-first Amendment."

Although appellees certainly agree with the trial court determinations set forth above, appellees would assert that the trial court minimized the effect of the Twenty-first Amendment on the classification at issue. That Amendment states in Section 2 as follows:

"The transportation or importation into any state, territory or possession of the United States for use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Previous decisions of this Court would indicate that regulations to control intoxicating beverages made pursuant to a state's police powers and later more specifically under the Twenty-first Amendment are entitled to great weight indeed.

The various states have traditionally had the power to regulate intoxicants by virtue of their Tenth Amendment police powers, and more recently, the Twenty-first Amendment to the United States Constitution. The unique nature of the regulation of intoxicants is clearly indicated by the existence of a separate constitutional amendment dealing

specifically with that commodity. However, apart from the Twenty-first Amendment adopted in 1933, the Supreme Court at an early date recognized the unique nature of the regulation of intoxicants and the non-existence of any legal right to trade in them. In *Crowley* v. *Christensen,* 137 U.S. 86 (1890), the Court reviewed the conviction of the petitioner who had been convicted of selling liquor without a license. The petitioner challenged his conviction on the basis that the discretionary power in granting and withholding of the license by the Board of Police Commissioners was a violation of the Equal Protection Clause. In denying the claim the Court stated:

> "By the general concurrence of opinion of every civilized and christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be extracted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be open. Their sale in that form may be absolutely prohibited. *It is a question of public expediency and public morality and not of federal law.* The police power of the state is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. *There is no inherent right in a citizen to thus sell intoxicating liquor by retail; it is not a privilege of a citizen of the state or of a citizen of the United States.* As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rests in the *discretion* of the governing authority . . . As in many other cases, the officers may not always exercise the power conferred upon them with the wisdom or justice to the parties affected. *But that is a matter which does not affect the authority of the state; nor is it one which can be brought under the cognizance of the courts of the United States.*" (Emphasis added.)

Similarly in *Giozza* v. *Tierman,* 148 U.S. 657 (1892), the petitioner was convicted by the state courts for the sale of liquor without a license. The challenged Texas law provided that applicants for a liquor license would post a five hundred dollar penal bond to be forfeited if the licensee sold liquor to certain prohibited persons. The petitioner contended that the imposed conditions operated to deny him the equal protection of the law. In denying the claim presented and affirming the conviction, the Court stated:

> "Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the Legislature of a state, except those imposed by its written constitution. There is nothing in the Constitution of Texas restricting the power of the Legislature in reference to the sale of liquor, and it is well settled that the Legislature of that state has the power to regulate the mode and manner and the circumstances under which the liquor traffic may be conducted, and to surround the right to pursue it with

such conditions, restrictions and limitations as the Legislature may deem proper. . . .

"The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. *Bartmeyer* v. *Iowa*, 18 Wall. 129.

"The amendment does not take from the states those powers of police that were reserved at the time the original constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances and the enjoyment of their rights; but it was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order. *Barbier* v. *Connolly*, 113 U.S. 27, 31; *In re Kemmler*, 136 U.S. 436."

A state's power to completely prohibit the trade in intoxicants has been held to be a matter which is no longer open to question by the courts, and no longer presenting a substantial federal question. See *Mugler* v. *Kansas*, 123 U.S. 623, 659 (1887). The Court in *Mugler, supra*, in addition, commented as follows on the power of the state in regulating intoxicants:

> ". . . By whom, or by what authority, is it to be determined whether the manufacturer of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public . . . Under our system of government that power is lodged with the legislative branch of the government. It belongs to that department to exert what are

known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety . . . Every possible presumption is to be indulged in in favor of the validity of a statue . . . If, in the judgment of the legislature, the manufacturer of intoxicating liquor for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question . . . Neither the amendment (Fourteenth) broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people. . . ."

The 18 through 20 year old males in the State of Oklahoma have been denied no constitutionally fundamental right, since any right to purchase beer does not exist and is not recognized by the courts. Furthermore, it was the prerogative of the Legislature to prescribe the regulations which they deemed most able to protect the people of the State of Oklahoma from any harm arising from the sale or use of intoxicants. That prerogative should be disturbed only upon the clearest showing of constitutional insufficiency. The appellees urge that the regulation of intoxicants is a matter of special legislative concern, and that except for the gravest constitutional insufficiencies, the Legislature's judgment on how to effectively regulate and control intoxicants should be upheld.

In *Seagram & Sons* v. *Hostetter*, 384 U.S. 35 (1966), the Court considered New York's law which regulated the price of liquor in the context of alleged violations of the Equal Protection and Due Process Clauses. In upholding the validity of the law and denying the injunctive and declaratory relief sought, the Court stated:

> "A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce . . . The reform may take one step at a time, addressing itself to the phase of the problem which seems most acute in the legislative mind."

In subsequently construing the powers of the various states by virtue of the Twenty-first Amendment, the United States Supreme Court has consistently upheld the states' broad powers in the area of the regulation of intoxicants. There can be no doubt but that the Oklahoma laws challenged herein regulate the sale and use of intoxicants within the territorial limits of the State of Oklahoma. Therefore, an examination of the relationship between the Twenty-first and the Fourteenth Amendment Equal Protection Clause would be relevant. In one of the early significant cases following the adoption of the Twenty-first Amendment, the Court in *State Board of Equalization* v. *Youngs Market Company*, 299 U.S. 59 (1936), ruled on a challenge to California's regulation which required an importer's license as being violative of the Equal Protection Clause. In upholding the validity of the State's classification the Court stated:

> "The claim that the statutory provisions and the regulations are void under the Equal Protection Clause

> may be briefly disposed of. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Later in *Mahoney* v. *Triner Corporation*, 304 U.S. 401 (1938), the Court again upheld the validity of a state's regulation of intoxicants, despite alleged violations of the Equal Protection Clause:

> "The sole contention of Joseph Triner Corporation is that the statute violated the Equal Protection Clause. The state officials insist that the provision of the statute is a reasonable regulation of the liquor traffic; and also, that since the adoption of the Twenty-first Amendment, the Equal Protection Clause is not applicable to imported intoxicating liquor. . . .
>
> "We are asked to limit the power conferred by the [Twenty-first] amendment so that only those importations may be forbidden which, in the opinion of the court, violate a reasonable regulation of the liquor traffic. To do would, as stated in the *Youngs Market* case, p. 62, 'involve not a construction of the amendment, but a rewriting of it.'"

See also *Carter* v. *Commonwealth of Virginia*, 321 U.S. 131, 142 (1944), in which the Court again rejected contentions that a state's regulation of intoxicating liquor must be a reasonable one. The Court approved its prior language in *Triner, supra,* to the effect that if the Court struck down those regulations of intoxicants which it felt unreasonable, then it would be in effect rewriting, and not construing a state's power pursuant to the Twenty-first Amendment.

In *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), the Court reviewed the validity of a Michigan statute which prohibited women, other than the wives and daughters of

owners, from being licensed as bartenders, as an alleged violation of the Equal Protection Clause. It is readily apparent that the Michigan statute construed in *Goesaert, supra,* involved a classification based on sex, analogous at least to the classification prescribed by the Oklahoma Legislature in the case at bar. The Supreme Court in *Goesaert, supra,* upheld the validity of the law as not being violative of the Equal Protection Clause. The Court stated beginning at page 465:

> "Beguiling as the subject is, it need not detain us long. To ask whether or not the Equal Protection of the Laws Clause of the Fourteenth Amendment barred Michigan from making the classification the State has made between wives and daughters of owners of liquor places and wives and daughters of non-owners, is one of those rare instances where to state the question is in effect to answer it. . . .
>
> "The Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers. *Michigan could, beyond question, forbid all women from working behind a bar.* This is so despite the vast changes in the social and legal position of women. The *fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the states from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic.* See the Twenty-first Amendment and *Carter* v. *Virginia,* 321 U.S. 131, 88 L. Ed. 605, 64 S. Ct. 464. *The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.*

> "While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon states precludes *irrational* discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.' *Tigner* v. *Texas,* 310 U.S. 141, 147, 84 L. Ed. 1124, 1128, 60 S. Ct. 879, 130 A.L.R. 1321. Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. . . .
>
> "We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling." (Emphasis added.)

See also *Krauss* v. *Sacramento Inn,* 317 F.Supp. 171 (E.D. Cal. 1970).

Most recently in *California* v. *LaRue,* 409 U.S. 109 (1972), the United States Supreme Court reaffirmed the plenary power of the states to regulate intoxicants and establishments where they are served. In *LaRue, supra,* the Court upheld California's power to prohibit explicitly live sexual entertainment in bars where liquor was dispensed by the drink. After noting that the Twenty-first Amendment "has been recognized as conferring something more

than the normal state authority over public health, welfare and morals," the Court went on to note in the last sentence of its opinion that there is a "presumption in favor of the validity of the state regulation in this area which the Twenty-first Amendment requires. . . ." The appellees respectfully urge that the challenged state law is authorized by and within the scope of the Twenty-first Amendment to the United States Constitution, as it regulates the sale and use of intoxicants within the State of Oklahoma. Since the sale-challenged state regulation deals with the regulation of intoxicants, the State has a great extraordinary interest in regulations obviously enacted for the ultimate welfare and safety of its citizens; that it, the State's regulation in the case at bar, is in an area over which the State has something more than the normal state authority over public health, welfare and morals. It would, indeed, be erroneous to state that a regulation of intoxicants was completely isolated from the Equal Protection and Due Process Clauses. However, the appellees urge that Oklahoma's interest in regulating intoxicants is extraordinary, and should be held to meet only the barest minimum requirements of equal protection.

Thus, in *Parks* v. *Allen*, 426 F.2d 610, 613 (5th Cir., 1970), the Court reviewed alleged violations of the Equal Protection Clause by an ordinance which prohibited the issuance of more than two retail liquor licenses to a family. It was alleged that persons were penalized by reason of their birth in not being able to obtain a license if members of the family had more than the prescribed number of licenses. In denying the injunction, the Court stated as follows:

"It is firmly established that the state through the 21st Amendment has a broad right to regulate traffic in intoxicating liquors in the valid exercise of its police power. *Crowley* v. *Christensen*, 137 U.S. 86, 11 S. Ct. 13, 34 L. Ed. 620 (1890); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 86 S. Ct. 1254 (1966); *Hornsby* v. *Allen*, 326 F.2d 605 (1964). *Moreover, the Fourteenth Amendment admits of the exercise of a wide scope of discretion in this regard. It only prohibits what is done when it is without any reasonable basis and therefore is purely arbitrary.* E.G., *Block* v. *Hirsh*, 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865 (1920); *Mestre* v. *City of Atlanta*, 255 F.2d 401 (5th Cir. 1958). Moreover, the exercise of the power in connection with the liquor industry *particularly allows the widest discretion and is subject to minimal demands of the Fourteenth Amendment's due process and equal protection requirements.* See *United States* v. *Frankfort Distillers*, 324 U.S. 293 at 299(5), 65 S. Ct. 661, 89 L. Ed. 951 (1945); *Atlanta Bowling Center, Inc.* v. *Allen*, 389 F.2d 713 (5th Cir. 1968); *Lewis* v. *City of Grand Rapids*, 356 F.2d 276 (6th Cir. 1966).

"*Thus there is a rebuttable presumption of the propriety of the ordinances under attack and, only upon a clear showing that they are arbitrary, should the court substitute its judgment for that of the legislative body concerned.* In such respect, legislative bodies are free to act on the basis of such intangibles as public opinion, hearsay, rumor and an original self-determination of proper policy and, unlike courts, are not limited to admissible testimony or a preponderance of the evidence or other judicial standards. Accordingly, the courts ought to be loath to interfere. If the ordinance under attack is arguably reasonable, it should be sustained. . . .

". . . [T]he plaintiff contends that the ordinances per se are unconstitutional in that they penalize him

unjustly. Thus, 'the condition of a man's birth or a matter over which he has no control cannot be made the basis of a rule restricting him from a license unless his condition is something that would make him unfit.' This claim that the ordinances are facially unconstitutional is likewise rejected. The argument presupposes that the sale of liquor is a right, rather than a privilege. And the test is the reasonableness of the ordinance as relates to the business licensed and not the reasonableness as it relates to a particular applicant. As seen, the ordinance is reasonably related to the control of abuses in the industry and plaintiff is on prior notice of its requirements. The mere fact that he does not qualify by virtue of birth is no bar, even though it might create a personal hardship. Circumstances of birth may preclude a person from holding certain jobs under the laws against nepotism. E.G. 18 U.S.C.A. §1910. Or from holding public office, even that of President." (Emphasis added.)

While appellees do not suggest that the Twenty-first Amendment stands alone and unfettered by other provisions of the Constitution, we do suggest that a presumption of validity in this narrow area is indicated and that the trial court should have thus considered the classification, together with the evidence and, if it had done so, no doubt whatever of the validity of these statutes would have remained. Thus, in *California* v. *LaRue, supra,* a regulation of intoxicating beverages was upheld even though First Amendment rights were threatened. In the case at bar, no such constitutional rights are even suggested to be infringed.

One further comment in regard to the trial court's conclusions must be made. The trial court might have

found specifically that administrative convenience was not the basis of this classification. The record amply supports this statement. More recent cases of *Stanton, Weinberger* and *Schlesinger* struck down sex-based classifications which were primarily based on such a premise, as indeed was done in *Reed* v. *Reed, supra.* In the case at bar, the trial court did correctly determine that the classification was for the protection of the persons affected and the public. While appellants suggest that the appellees could test each person individually for blood alcohol content, such a suggestion is absurd on its face. The point being that any such administrative inconvenience was not the basis or foundation for the classification, rather the very lives and property of the persons affected and the public was involved and was the primary objective of the Legislature. In summary, the public health and welfare, which is sought to be protected by the statutes, is much more concrete and real than the "other" reasons given to this Court to sustain the sex-based classifications in *Stanton, Weinberger, Schlesinger,* and *Reed* cases. This Court wisely looked beyond these "other" reasons and found that the foundation for such classification insufficient. Appellees assert that the record in this case amply supports the trial court's conclusions in upholding the Oklahoma statutes.

PROPOSITION II

THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE PROOF WAS SUFFICIENT TO SHOW A RATIONAL BASIS FOR THE LEGISLATIVE CLASSIFICATION.

Both the appellants and amicus curiae have gone to great length to find fault with the evidence submitted to the trial court by the appellees. In responding to these objections it is appropriate to review the Findings of Fact by the trial court after it had examined all of the evidence submitted in the case. The trial court's findings were specific and to the point as quoted below from Jurisdictional Statement, page A14, 399 F.Supp., at 1311:

> "With this in mind, we find in the record sufficient support of the rationality of the limited sex-based classification in question under the *Reed* test. We find each support in the record data indicating more likely consumption of beer by males in the 18-20 age group; more driving in this age group by males with significant BAC levels than by females; the greater number of vehicle injuries in the younger male group; and the apparent relationship of such injuries to alcohol use. We conclude that the classification made has a fair and substantial relation to apparent objectives of the legislation for the protection of those affected and the public generally." (Footnotes omitted.)

Appellees urge that the evidence was more than ample to support these findings. Both appellants and amicus curiae urge that the evidence submitted by appellees proves that 18-20 year old males are inferior to like-aged females. Appellees invite this Court to examine the findings of the trial court and in doing so will discover that no such finding was made by the trial court or suggested by

the appellees. No effort was made by the appellees to prove that 18-20 year old males were in any way less capable than 18-20 year old females, the effort to construe the evidence as somehow proving such a state is entirely that of appellants. The evidence is sufficient to support the trial court's findings, noted above, and these findings are clearly legally cognizable as a basis for the classification at issue.

The appellees introduced eight exhibits in support of the restrictions on the sale of 3.2 beer, the most pertinent portions of which are summarized as follows:

Appellees' Exhibit I, Jurisdictional Statement A22 and 399 F.Supp., at 1314, which is an extract of data compiled by the Oklahoma State Bureau of Investigation, represents figures submitted by 194 law enforcement agencies in the State of Oklahoma. The Exhibit shows that for the offense of Driving Under the Influence, 92% of the 18 year olds arrested were male, 98% of the 19 year olds were male, and 95% of the 20 year olds were male. Of those arrested for drunkenness 90% of the 18 year olds were male, 91% of the 19 year olds were male, and 91% of the 20 year olds were male.

Appellees' Exhibit II, Jurisdictional Statement A23 and 399 F.Supp., at 1315, reflects the total number of persons arrested for various crimes by the Oklahoma City Police Department in 1973. For the offense of Driving Under the Influence, 82% of the 18 year olds were male, 98% of the 19 year olds were male, and 94% of the 20 year olds were male.

The overall percentage of males arrested for Driving Under the Influence, of all ages was 92%. Thus, for the

ages 19 and 21, the percentage of males arrested was higher than the overall rate, with the 19 year old figure showing a significant increase over the average.

Appellees' Exhibit II also shows that for the offense of Drunkenness, 85% of those 18 year olds arrested were male, 83% of the 19 year olds were male, and 84% of the 20 year olds were male.

Appellees' Exhibit III, Jurisdictional Statement A24-A29, and 399 F.Supp., at 1315-1320, contains the results of a scientific random roadside survey of drivers conducted by Oklahoma Management and Engineering Consultants, Inc. (O.M.E.C., Inc.) pursuant to a research grant from the Alcohol Safety Action Program. The survey was conducted at 19 locations in all quadrants of Oklahoma City during August of 1972 and 1973. The data is compiled by sex for the age group of under 20 years of age.

The cover letter reveals that the total number of drivers, male and female, under 20 years was 313 in 1972 and 306 in 1973. A comparison of that data with Table 3 reveals that in 1972, 78% of the randomly selected drivers under 20 years were male, and in 1973, 78% of the drivers under 20 were male. Table I shows that male drivers under 20 drive more average miles than females, and slightly more average days per week than females.

A comparison of Tables 2 and 3 reveals that of *all* males interviewed, 78% in 1972 and 74% in 1973 stated that their drink preference was beer. However, of the males *under 20 years* who were interviewed, 84% in 1972 and 80% in 1973, stated that their drink preference was beer. Of *all* females, 54% in 1972 and 44% in 1973 stated

their drink preference as beer. Of females *under 20*, 77% in 1972 and 50% in 1973 stated their drink preference to be beer.

Table 1 also shows: (1) that more males than female drivers under 20 had drunk alcoholic beverages within the two hours prior to interview, (2) that more male than female drivers under 20 had a Blood Alcohol Concentration (BAC) of greater than .01, and (3) that of those drivers under 20 who had a BAC of greater than .01, a significantly higher percentage of males had BAC's of .05 or greater.

Appellees' Exhibit IV, Jurisdictional Statement A30, and 399 F.Supp., at 1320, which contains data of Oklahoma motor vehicle collisions, compiled by the Oklahoma Department of Public Safety, portrays a very disturbing statistic. On page 7 of the report, there appears a summary of persons killed and injured in Oklahoma by age and sex. A cursory review of the various listed age groups as a whole reveals that the age group 17 through 20 years suffered the greatest number of persons killed and injured, than any other age group, in all categories, except pedestrians. The table shows a total of 116 males (77%) and 34 females (23%) were killed statewide in Oklahoma. Also, a total of 2,811 males as opposed to 1,916 females were injured statewide; again, the highest number in any age grouping listed. Of the drivers aged 17-20 who were killed, 65 were male and 14 were female.

Appellees' Exhibit V, Jurisdictional Statement A31, and 399 F.Supp., at 1321, also a summary by the Oklahoma Department of Public Safety, contains the data for 1973. Again, the 17-20 year old age group led in all categories,

except pedestrian deaths and injuries. A comparison of Exhibits IV and V reveals an even more disturbing statistic: Even though fewer total deaths occurred in 1973 (797 total, 544 males and 253 females) than in 1972 (843 total, 597 males and 246 females), the total deaths and injuries in the age group 17-20 *continued to increase*. Most significantly the number killed and injured *drivers* in age group 17-20 continued to rise.

Also, in both 1972 and 1973, the number of killed and injured drivers, both male and female, continued to increase. In addition, Exhibits IV and V both reflect that significantly more males than females were killed and injured in all categories.

Unfortunately, the Department's statistics in appellees' Exhibits IV and V do not show the levels of intoxication, if any, of those killed and injured in age group 17-20, but it is still amply illustrated that this age group is particularly vulnerable to death or injury in motor vehicle collisions, whether as a result of either intoxication or inexperience in driving, or both.

Appellees' Exhibit VI, App. 182-184, is a summary compiled by the Federal Bureau of Investigation of data from 10,000 law enforcement agencies covering 93% of the United States population. Table 29 at page 123 of the report shows a *nationwide increase* in the number of persons arrested for driving under the influence for the year 1972, as compared with the year 1967. The percentage increase (138%), of arrests for driving under the influence is larger than any other crime listed, except narcotic drug laws; the same is true for both age groups listed.

Table 34, at page 129, App. 184, shows that the 1972 national percentage of males of all ages arrested for Driving Under the Influence is 93% and 92% for the offense of drunkenness.

Appellees' Exhibit VII, App. 185-207, a report compiled by the Minnesota Department of Public Safety, shows that other states' statistics are similar to Oklahoma. Table 4, at page 7 of the report, shows more male drivers under 20 were killed than females, with significantly more males having extraordinarily high BAC levels than females.

Appellees' Exhibit VIII, App. 208-226, is a federal report on the proceedings of the Joint Conference on Alcohol Abuse and Alcoholism. Table 9, at page 127 of the report, shows a significantly higher "accident-vulnerability ratio" for 18-19 males at BAC levels of .01-.04 and .05-.09. The summary at page 130 of the report, App. 224, states that:

> "Under the age of 18, driving after drinking is quite rare. However, the frequency and intensity of driving after drinking increases rapidly for drivers 18 and 19 years old . . . there is an important relationship of alcohol to youth-involvement in collisions. . . . This concerns the impact of small amounts of alcohol; i.e., those resulting in BAC's which are positive but less than .05. Among teenagers such low concentrations are an important component in crashes. . . ."

The appellees urge that the preceding evidence-in-chief supports the conclusion that the classification is reasonable in prohibiting the sale of beer to a class (males 18-20) who have a demonstrated vulnerability to auto accidents. Surely the minimization of drunk drivers on Oklahoma highways is a rational objective of the Oklahoma Legislature, and even a compelling stated interest.

Both appellants and amicus curiae first complain that the arrest statistics in Exhibits I and II are of no significance because they did not show convictions for the respective offenses. Appellant cites *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 241-243 (1957), and *Loper* v. *Beto,* 405 U.S. 473 (1972), for the proposition that only convictions can prove guilt of any particular offense and that the records must show that the conviction was with counsel. However pertinent these cases may be where an individual is concerned they are not significant to the case at bar in that the appellees did not try to prove, as in the *Schware* case, *supra,* that any one individual lacked good moral character nor, more importantly, did the appellees attempt to prove that any individual was guilty of a crime, but rather this Exhibit, as the remaining ones, attempts to show involvement with alcoholic beverages of a group and in this respect the statistics are of the same nature as those used in *Kahn* v. *Shevin,* 416 U.S. 351 (1974). In that case a Florida statute granting a tax exemption for widows, but not to widowers, was upheld against an equal protection attack. This Court concluded at page 353:

> "There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man."

Numerous statistics were used, similar in nature to those offered in the case at bar, to support this conclusion. Based on the evidence this Court further stated at pages 355-356:

> "There can be no doubt, therefore, that Florida's differing treatment of widows and widowers ' "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation." ' *Reed*

v. *Reed,* 404 U.S. 71, 76, 30 L. Ed.2d 225, 92 S. Ct. 251, quoting *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415, 64 L. Ed. 989, 40 S. Ct. 560.

> "This is not a case like *Frontiero* v. *Richardson,* 411 U.S. 677, 36 L. Ed.2d 583, 93 S. Ct. 1764, where the Government denied its female employees both substantive and procedural benefits granted males 'solely . . . for administrative convenience.' Id., at 690, 36 L. Ed.2d 583 (emphasis in original). We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden. *We have long held that '[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356, 359, 35 L. Ed.2d 351, 93 S. Ct. 1001. A state tax law is not arbitrary although it 'discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution. *Allied Stores* v. *Bowers,* 358 U.S. 522, 528, 3 L. Ed.2d 480, 79 S. Ct. 437. This principle has weathered nearly a century of Supreme Court adjudication, and it applies here as well. . . ."

A similar, if not stronger, consideration is afforded classifications drawn under the authority of the Twenty-first Amendment as evidenced by *California* v. *LaRue, supra,* and other cases cited in Proposition I.

The appellants and amicus curiae again suggest that the exhibits dealing with arrest cannot be recognized because they do not rule out multiple arrests. Exhibit I alone,

establishing 90 plus percent of 18, 19, and 20 year old arrests for Driving Under the Influence as being male, cannot be disregarded because the percentage figure might be reduced somewhat by an unknown number of multiple arrests. The Exhibit is sufficient to show a vastly larger percentage of 18-20 year old males, as opposed to females, are involved in driving and drinking, irregardless of the percentage figure that might result from actual convictions, even considering a reasonable number of multiple arrests.

Exhibits I and II are further objected to because they are not related directly to only 3.2 beer. The fallacy of this argument lies in the fact that the Exhibits reflect arrest for drunkenness or Driving Under the Influence which are determined by the effect of alcohol on the person, not the source of that alcohol. The Exhibits need not have been limited to 3.2 beer because, as the appellants point out in their brief, there is no classification as to males and females in regard to other intoxicating beverages; the purchase of "hard liquor" is denied to both sexes until 21 years of age. Oklahoma Constitution, Article 27, §5, and 37 O.S. 1971, §537(a)(1). The Legislature had every right to look to other sources of alcohol and regulate its availability. Any "hard liquor" included in the arrest statistics in Exhibits I and II were already illegal under the Oklahoma law but the involvement of this 16-20 year old age group with alcohol resulted, in effect, in the regulation that no one could purchase 3.2 beer until 18 and even this privilege was denied to males until 21 years of age. Appellants suggest further that the Exhibits must be other than 3.2 beer because it is non-intoxicating and cites as authority *State, ex rel. Springer* v. *Bliss*, 199 Okla. 198, 185 P.2d 220 (1947).

The cited case does not say that 3.2 beer cannot be intoxicating in fact, but held only that 3.2 beer was not a prohibited beverage under Oklahoma's old prohibition laws. A later Oklahoma decision bears this out, as was stated in *Douglas* v. *State*, Okla., 225 P.2d 376, 380 (1950):

> "The defendant's second proposition is that the trial court erred in excluding evidence sought to be elicited on cross examination of the highway patrolman about what kind of liquor they smelled on the defendant's person and his breath. The trial court sustained his objection to this cross examination. The object of the defendant in seeking this information appears in his 5th proposition to the effect that the court erred in not giving his requested instruction that the state should be required in substance to prove 3.2 beer was intoxicating. It therefore appears that the defendant sought to lay the predicate for putting this burden of proof on the state by showing the officers smelled beer on the defendant, several bottles of which the officers found in the car, and the defendant admitted he had been drinking. This contention and the contention in the defendant's fifth proposition will be considered together. The kind of liquor the defendant had been drinking was immaterial. The material fact was, was the defendant drunk whether on 3.2 beer or liquor with an alcoholic content in excess thereof. It was not error to exclude such evidence on cross examination and refuse the defendant's requested instruction. In *Foglesong* v. *State*, 69 Okl. Cr. 360, 103 P.2d 106, it was said:
>
> " 'Section 1, Chapter 153, Session Laws of 1933, 37 Okl. St. Ann. §151, defines what is "intoxicating" and "non-intoxicating" liquors. The definition under this act was for the purpose of thus classifying beverages, as a foundation for the subsequent licensing and taxing provision. It was not intended to regulate the pro-

visions of the law with reference to the enforcement of the criminal statutes.

" 'Section 10324, O.S. 1931, 47 Okl. St. Ann. §93, makes it an offense for one who is under the influence of intoxicating liquor, or who is a habitual user of narcotic drugs, to operate or drive a motor vehicle on any highway within the state.

" 'Under this statute it was the intention of the Legislature to punish those who were in fact "under the influence of intoxicating liquor," whether it be caused from drinking beer with an alcoholic content of 3.2 per cent or liquor in excess thereof.'

"Hence the lack of merit in the defendant's second and fifth contentions clearly appears."

In the same vein the appellants argue that the number of miles males drive versus females could affect the validity of the arrest statistics. While this line of argument might show interesting results from a Driving Under the Influence per mile driven comparison between male and females, it does not detract the significance of these Exhibits in that if males as a class do drive more miles than females while indicating a preference for beer it still lends strength to the reasonableness of the classification. It logically follows that if, in fact, males do drive a significant number of miles more than females in the 18-20 year old age group that they might constitute a class whose accessibility to 3.2 beer should be curtailed.

Appellants next contend that because Exhibits I and II contain a category of offenses labeled "liquor laws," which contained as a part of its statistics arrests for offenses which would not apply equally to males and females, such as "working-in-a-beer-joint-by-a-minor," that the entirety

of both Exhibits were inadmissible and the judgment of the trial court is thus tainted with constitutional error. Appellants cite as authority *Fahy* v. *Connecticut*, 375 U.S. 85 (1963) and *Chapman* v. *California*, 386 U.S. 18 (1967). While these cases deal with illegally seized evidence and unconstitutional argument as requiring reversal of state criminal convictions, they cannot be construed to require a similar effect here. The category complained of constituted but one part of these Exhibits and the trial court properly did not exclude the entire Exhibit in either case. Furthermore, the trial court did not consider this particular data in reaching its decision, as can be quickly determined by again examining the specific Findings of Fact in the Opinion. Indeed, contrary to appellants' contentions, it appears obvious that the trial court disregarded this category altogether in that it was ignored completely in its decision.

Appellants and amicus curiae also suggest that there is selective law enforcement in Oklahoma in regard to males which ignores apparently certain offenses by females while arresting males and thus invalidates the statistical data introduced into evidence. But to what proof do they refer—none. No evidence of this so-called condition was before the trial court and none is offered to this Court. Rather, appellants ask this Court to take, in effect, judicial notice of a condition which is not proved to exist. Appellants rely on two case decisions to support his ungrounded statement of selective law enforcement in Oklahoma. The first is *Hayes* v. *Municipal Court*, Okla., 478 P.2d 974 (1971). This case, like the next one discussed, held as unconstitutionally vague certain vagrancy ordinances, but did not show any selective law enforcement against males as op-

posed to females and does not concern itself with the type of arrest records before this Court. To this same effect is *Papachristou* v. *Jacksonville*, 405 U.S. 156 (1972). While this case proves no selective enforcement pertinent to this case, it is an excellent example of the use by this Court of arrest data, see Footnote 16 beginning at page 169. Accordingly appellees respectfully request this Court to disregard this line of argument as completely unfounded.

In summary all of the appellants' and amicus curiae arguments in regard to the evidence submitted by appellees go to the weight to be given this evidence and not to its admissibility. While appellants suggest that a test might be given to individuals between 18-20 years of age as a less drastic alternative, surely this suggestion was correctly ruled out by the trial court. Considering the staggering, if not impossible, task of administering a sobriety test to each such person each time he decides to drive an automobile would not be a viable alternative solution as indicated in *Vlandis* v. *Kline*, 412 U.S. 441 (1973). See also the trial court's specific comments on this issue in the Jurisdictional Statement at pages A18-A19 and 399 F.Supp., at 1313.

Moreover, certain portions of the testimony of the appellants' experts further support the validity of the state's classification. One witness testified:

(1) that males have a greater interest in experimenting with alcohol (App. 82-83),

(2) that he has observed and treated more young male alcoholics, than females (App. 88),

(3) that women start drinking later in life (App. 85-89),

(4) that males between the ages of 18-21 would be more inclined to experiment with alcohol (App. 93-95),

(5) that males are generally more aggressive, or have a greater drive behavior in all years of their lives, including the years 18-21 (App. 95),

(6) that the greater activity behavior of males has leveled off at its highest level through the years 18-21 (App. 96),

(7) that more males aged 18-21 than females were alcohol users (App. 104),

(8) that for socially-determined reasons, males do tend to use alcohol more readily and more readily to the point of being identifiable abuse at all ages, including 18-21 (App. 109),

(9) that the challenged legislation is in the interest of controlling a tiny part of the problem of controlling drinking offenses (App. 111).

Another witness testified:

(1) that in general males consume greater quantities of alcohol than females (App. 125),

(2) that most of his subjects, male and female, started drinking around age 18 (App. 127).

The appellees urge that all of the preceding evidence amply illustrates a problem ripe for legislative action. The evidence submitted in this case demonstrates that there are different drinking and drinking-influenced behavior patterns between males and females aged 18-20. The differences may or may not be biological or psychological in

origin; the evidence in this case is not conclusive in either possibility. What is clearly established is the difference in alcohol-related behavior, for whatever reason, between males and females aged 18-20, which supports and establishes the rationality of the legislative classification in 37 O.S. Supp. 1975, §245.

PROPOSITION III

THE STATE OF OKLAHOMA HAS THE RIGHT TO SHOW THE RATIONAL BASIS FOR ITS LEGISLATION WITHOUT PROVING THAT SUCH LEGISLATION WAS A PERFECT SOLUTION.

Appellants' main thrust in their third proposition is that through their own reasoning and interpretation of the evidence, the Oklahoma statutes are ineffective and, therefore, irrational and unconstitutional. Appellants quote no legal authority for this line of reasoning but appellees feel that this line of argument has been rejected entirely by this Court. Thus, in *Seagram and Sons* v. *Hostetter*, 384 U.S. 35, 50-51 (1966), this Court limited the review of state laws in regard to whether they were successful or not. See quotations on page 10 of this brief.

More recently in *Kahn* v. *Shevin, supra,* at page 356, footnote 10:

> "The dissents argue that the Florida Legislature could have drafted the statute differently, so that its purpose would have been accomplished more precisely. But the issue of course is not whether the statute could have been drafted more wisely, but whether the lines chosen by the Florida Legislature are within constitutional limitations. . . ."

Thus, how well the Legislature of Oklahoma addressed itself to the problem of alcohol and its effect on death, injury and property loss on Oklahoma highways is not at issue here but only whether this regulation of alcohol in the questioned statutes is within constitutional limits, which burden the State has met.

Appellants' last proposition also asks this Court to hold that any classification by sex is automatically unconstitutional. Thus they suggest that any such classification is beyond merely "inherently suspect," which this Court has not held but is entirely and unequivocally forbidden by the Constitution. Appellants apparently reject the State of Oklahoma's right to prove its classification at bar had a rational basis. The appellants are simply saying it is impossible as a matter of law. Perhaps appellants are saying that they should only have had to file a complaint with the trial court in order to bring the offending statute to its attention, no opportunity to present a defense would have been necessary under this reasoning. Though litigation is time consuming and the appellees have been required to burden the Court with evidence, nothing in the *Stanton* v. *Stanton* decision, *supra*, or *Reed* v. *Reed, supra*, places an automatic unconstitutionality of any classification and appellees have shown the reasonableness of its classification sufficient to withstand the constitutional attack against it.

CONCLUSION

The trial court was correct in determining that the Oklahoma statutes at issue do not deny the appellants equal protection of the laws guaranteed by the Fourteenth Amendment, but rather are well within the authority granted the states to control alcoholic beverages under the Twenty-first Amendment. Further, the classification delaying the purchase of 3.2 beer to males until 21 years of age is fully supported by the evidence so as to satisfy the rationale of *Reed* v. *Reed, supra*, and therefore appellees respectfully request this Court to affirm the decision of the lower court.

Respectfully submitted,

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April, 1976

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument were served upon:

Mr. Fred P. Gilbert
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the only parties to be served, by mailing such true and correct copies, postage prepaid, this ..... day of April, 1976.

.....
JAMES H. GRAY

Supreme Court, U. S.
FILED
SEP 29 1976
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

In The
Supreme Court of the United States

October Term, 1976

No. 75-628

CURTIS CRAIG,
and
CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Appellants,

vs.

Hon. DAVID BOREN, Governor, State of Oklahoma,
Hon. LARRY DERRYBERRY, Attorney General,
State of Oklahoma,
Hon. D. M. BERRY, Chairman,
Hon. LAWTON L. LEININGER, Vice-Chairman,
Hon. J. L. MERRILL, Secretary-Member,
Oklahoma Tax Commission,
Hon. RAY WALL, Presiding Judge,
Ninth Judicial District Court, State of Oklahoma,
Hon. CHARLES H. HEADRICK, District Attorney,
Ninth Judicial District, State of Oklahoma,
Hon. ROSE JARVIS, District Court Clerk,
Payne County, State of Oklahoma,
Hon. FRANK PHILLIPS, Sheriff,
Payne County, State of Oklahoma,
and
Hon. HILARY DRIGGS, Chief of Police,
Stillwater, Oklahoma,
Appellees.

REPLY BRIEF OF APPELLANTS

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SUMMARY

1. The State's implied "right-vs.-privilege" approach is constitutionally untenable. *Bell* v. *Burson* (1971) 402 U.S. 535, 539. Nor does the Twenty-First Amendment "repeal" with respect to intoxicants other applicable constitutional safeguards. *California* v. *LaRue* (1972) 409 U.S. 109, 115, 120; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.* (1964) 377 U.S. 324, at 331-332. *Goesaert* v. *Cleary* (1948) 335 U.S. 464, and *Cronin* v. *Adams* (1904) 192 U.S. 108, are presented for retirement.

2. The State in effect concedes that its statistics do not prove its case. In any event, its statistics are not properly even before the Court. *Weinberger* v. *Wiesenfeld* (1975) 420 U.S. 636, n. 16 at 648.

3. The sexual stereotyping relied on by the State in this case is simply the latest edition in a series of similar sterotypes already rejected by this Court.

4. Common sense, no less than simple justice, requires that the "plain English" of fundamental guarantees must prevail over legalistic obfuscation.

In The
Supreme Court of the United States

October Term, 1976

No. 75-628

CURTIS CRAIG,
and
CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Appellants,
vs.
Hon. DAVID BOREN, Governor, State of Oklahoma,
et al.,
Appellees.

REPLY BRIEF OF APPELLANTS

COME NOW APPELLANTS, and for their Reply Brief herein, respectfully argue and urge as follows:

The State's brief advances essentially two arguments in defense of its beleagered statute: first, that in the area of intoxicants the States are simply under no constitutional limitations at all in enacting arbitrary and irrational discriminations on the basis of sex (or race? or religion? class, etc.?); and second, even if there be some constitutional limitation on the States' power to enact such discriminations, the State has proven so enormous a difference between males and females with regard to 3.2% beer as to justify the discrimination at bar. There is no merit to either argument.

1. Alcohol

The State's primary argument, as contained in its Proposition I, implies a "logical" extension of the Twenty-First Amendment: namely, that under that Amendment access to intoxicants is not a "right" but only a "privilege," wherefor the State Legislature is entitled to be as arbitrary, as irrational and as capricious as it chooses since, by hypothesis, no "rights" are being denied to anyone.

The infirmity of this "right-versus-privilege" approach is revealed by the very antiquity of the Victorian precedents relied on by the State. (State's brief, pp. 6-9).[1] That spurious doctrine has long since ceased to be a controlling (or even relevant) consideration in the constitutional analysis of State action, not only under the Due Process Clause,[2] but even more so for Equal Protection purposes. The idea under this latter guarantee is that even if some entitlement under State policy (whether by State constitution, statute, case-law, administrative

[1]See also the Edwardian *Cronin* v. *Adams* (1904) 192 U.S. 108.

But Antiquity was never unanimous in its toleration of sexual discrimination. Lord Coke himself noted of that fountainhead of English liberty, Chapter 29 of Magna Carta ("Nullus *homo* liber capiatur, vel imprisonetur . . . aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae . . ."), that ". . . *homo* doth extend to both sexes, men and women . . ," and wherefor women ". . . are also comprehended within this Chapter." 2 Co.Inst. 45. [*Homo* is the Latin for "man" in the sense of "human being," *vir* being the term for "man" as "male adult."]

[2]See *Bell* v. *Burson* (1971) 402 U.S. 535, 539, and *Schware* v. *Board of Bar Examiners* (1957) 353 U.S. 232, 239; see also Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harv.L.Rev. 1437 (1968).

regulation, de facto policy, or whatever) *be* less than Federally mandated, and hence not, perhaps, a "right" inherently or in the abstract, nevertheless, *once* the State confers that entitlement, however much as a matter of mere discretion, upon some favored segment of its population, *then* the Equal Protection Clause commands the benefit's simultaneous extension to all other similarly-situated segments of the State's population.

For example, the Federal Constitution does not actually require a State to provide a system of public education for anyone (e.g., Blacks and/or Whites). Nevertheless, said this Court in *Brown* v. *Board of Education* (1954) 347 U.S. 483,

> "Such an opportunity, *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms."

Id., at 493 (emphasis added). Likewise, also, with the purely legislative (i.e., discretionary or gratuitous) election to provide a procedural mechanism for reviewing jury verdicts:

> "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

Griffin v. *Illinois* (1956) 351 U.S. 12, at 18.

Of particular relevance to this Equal Protection "right-versus-privilege" contention is the matter of the age at which a young person is deemed to become an "adult," either in general, or for some particular purpose. No court has held that the enjoyment of adulthood

at some specific age is an inherent (or "Due Process") "right" of the young person. Instead, the defining of "adulthood" is generally a matter left to the broad discretion of the Legislature.[3] But once the Legislature determines, whether as a matter of mere discretionary grace or otherwise, to confer the benefits of majority upon some favored segment of its young people, the Equal Protection Clause then requires (and accomplishes) the conferring of those benefits upon all other similarly-situated young persons in the State. This right to the *equal* enjoyment of adulthood, while maybe not "inherent" in the Due Process sense and only "derivative" from some State "privilege" enjoyed by the favored, is still a *Federal* right of constitutional proportions because of the Equal Protection Clause. See, explaining this very point, *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. den. 413 U.S. 922 (1973), footnote 7 at 465 F.2d, p. 52.

And most relevant for our purposes in the instant Appeal is the *unanimous* rule of law (but for the lower decision herein) that "similarly-situated" young people, for the purpose of the equal enjoyment of adulthood at the same age, *does* mean, inter alia, "irrespective of the *sex*" of the young people! *Stanton* v. *Stanton* (1975) 421 U.S. 7, *Bassett* v. *Bassett* (Okla.App., 1974) 521 P.2d 434, *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, and the remaining host of "age-sex" pronouncements collected at pp. 15-16 of the Appellants' main brief herein.

However, it is not only the State's conclusion from its implied "right-vs.-privilege" theory that is fallacious; the State's primary assumption, that the Twenty-First Amendment somehow reduces the enjoyment of 3.2% beer from a "right" to a [mere] "privilege," is itself no less erroneous.

[3]One exception might now be with respect to voting. U.S. Const., Amend. XXVI (1971).

Let us but examine the Amendment itself. First of all, its limitation to "intoxicating liquors" reduces the Amendment to limited relevance in this case since the 3.2% beverage herein is *non*-intoxicating. 37 Okla.Stat. 163.1 (see fn. 1, and surrounding text, pp. 6-7, to Appellants' brief-in-chief).

Second, the Amendment's authorization to the States is to regulate the "transportation or importation" of intoxicants, which scarcely can be "construed" to mean the discrimination in the personal, private consumption thereof on such un-American bases as race, creed, color, sex, etc. Obviously, the "transportation or importation" language was inserted in the Amendment to insure, once the Eighteenth Amendment was repealed, that the situation engendered by *Leisy* v. *Hardin* (1890) 135 U.S. 100 did not by inadvertance reoccur.

In other words, what the Seventy-Second Congress which drafted the Twenty-First Amendment (in 1933) intended was (1) to repeal the Eighteenth Amendment, and (2) to allow the States broad powers of *economic* regulation over intoxicants without the traditional Commerce Clause, and even Fourteenth Amendment pitfalls that had impeded legislative attempts at economic regulation in the past, as per *Leisy* v. *Hardin*, supra (Commerce Clause), and, e.g., *Lochner* v. *New York* (1905) 198 U.S. 45 (Fourteenth Amendment). Therefore, until these antecedent "interstate commerce" and "substantive due process" precedents were overruled in the late 'Thirties and afterwards, it was necessary, in those very early days of the Twenty-First Amendment, to take the attitude that neither these older economic-regulation precedents, nor, by extension, their underlying Com-

merce Clause and Fourteenth Amendment provisions, applied to State liquor legislation, and *that* is the background, and the explanation, for the out-of-context *dictum* quoted by the State from the *economic* case of *State Board* v. *Young's Market Co.* (1936) 299 U.S. 59, 64 ("A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth").

However, as the years rolled on and the "old" economic-regulation decisions *did* get overruled, so also waned the necessity for judicially "protecting" the States in their legislation over intoxicants from the rest of the Constitution:

> "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification."

Hostetter v. Idlewild Bon Voyage Liquor Corp. (1964) 377 U.S. 324, at 331-332. Likewise too with the theory that the Twenty-First Amendment had "repealed" not only the Eighteenth Amendment, but the Fourteenth as well:

> "These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. In Wisconsin v. Constantineau, 400 U.S. 433 (1971), the fundamental notice and hearing requirement of the Due Process Clause of the Fourteenth Amendment was held applicable to Wisconsin's statute providing for the public posting of names of persons who had engaged in excessive drinking.

> "This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution."

California v. *LaRue* (1972) 409 U.S. 109, at 115 and 120. See also *Moose Lodge No. 107* v. *Irvis* (1972) 407 U.S. 163, at 178-179, and *Hornsby* v. *Allen* (5th Cir., 1964) 326 F.2d 605, 609-610.

Thus, there is *nothing*, either in the wording of the Twenty-First Amendment, its legislative history, or its subsequent judicial development, to suggest that under the guise of their broad economic (and to a lesser extent their "morals") powers over alcohol the States are at liberty to discriminate regarding the sale thereof on the basis of such historically invidious criteria as race, creed, color, etc. In fact, the State has even *confessed* it may not enact an age-*racial* discrimination regarding 3.2% beer like that at bar (e.g., Caucasians at 18 and Negroes at 21)! Appendix, pp. 97-98. Upon what, then, does the State claim blanket justification to erect the instant *sexual* discrimination? On nothing — except for the inevitable refrain from that blight upon our American jurisprudence, *Goesaert* v. *Cleary* (1948) 335 U.S. 464, which the District Court most astutely avoided even *citing*, and which has been tactfully ignored (or "distinguished") by *every* modern case on the alcohol/sex-equality subject as an embarrassment which everyone would rather forget. See, e.g., the alcohol/sex-equality cases collected at pp. 16-17 of the Appellants' brief-in-chief. Attention is also respectfully invited to the excellent article, "The Effect of the Twenty-First Amendment on

State Authority to Control Intoxicating Liquors," 75 Col.L.Rev. 1578, 1595-1610 (1975).

The State tacitly perceives that the Twenty-First Amendment does not afford the State a *blanket* authority to discriminate on the basis of sex with regard to intoxicants. Therefore, the State retreats to its second argument, being that of its "proof" of the "rationality" of this specific sexual discrimination in particular on the basis of the "evidence" adduced. This second argument, however, is in substance a Fourteenth, not a Twenty-First Amendment, contention.

2. *Sex and Statistics*

The State proffers its "evidentiary" argument in what appears to be the hopeful stance of a more-or-less "traditional" Fourteenth Amendment analysis: that a statutory discrimination ("classification") is presumptively valid, and "rationality" is inferred for it if any conceivably legitimate purpose for the law can be imagined, and if there exists some minimal scintilla of evidentiary or judicially-noticeable nexus between the means employed and the goal imagined. To establish that tenuous linkage between the legislative end (reducing vehicular accidents) and the statutory means (banning 3.2% beer sales to 18-21 year old males), the State relies almost exclusively upon Oklahoma Department of Public Safety statistics.[4] Earlier, the State had conceded that these

[4]Compare the recent experience-based report of the New Jersey State Police Information Director. When New Jersey lowered its legal drinking age from 21 to 18 in 1973, opponents warned that drunken driving by young persons would create a major hazard. It hasn't. New York Times, May 6, 1976, p. 41, col. 1. See also New York Times, December 31, 1973, p. 38, col. 1 (New Jersey accident figures for the 18-21 age group for the year immediately prior to and the year immediately following lowering the drinking age from 21 to 18 "just about balance out").

statistics are not "specifically on point." Appendix, p. 67. This time around, the State acknowledges that the data may not even be on point at all, as the State first considers it merely "unfortunate" that the Department's statistics "do not show the levels of intoxication, *if any*, of those killed or injured" (State's brief at 22, emphasis added), and then candidly recognizes that, so far as its statistics show, accidents involving young people may be wholly the result of "inexperience in driving" (State's brief, at 22). Surely this "proof," as the State presumes to denominate it, establishes no difference whatever in 3.2%-beer-related behavior between 18-21 year old males and females. See State's brief, at 32. Indeed, the sole clear and direct evidence of alcohol's influence on young people was introduced by the Appellants. That evidence, ironically a University of Oklahoma Medical Center study, demonstrates that "females were physically no more able, and in some instances were less able, than males to handle comparable alcohol dosages." 399 F.Supp. at 1311, Juris. Stmnt. at A-13.

The State also calls attention to *Papachristou* v. *Jacksonville* (1972) 405 U.S. 156, 168-169 and fn. 15, as an "excellent example of use by this Court of arrest data." State's brief, at 30. The very excellence of that example highlights the infirmity of the State's heavy reliance on mere arrests in this case. Far from using that data, as does the State here, to argue "where there's smoke, there's fire," this Court in *Papachristou* pointed to the nationwide incidence of arrests for "vagrancy" and "suspicion" as evidencing not the validity of those arrests, but rather the invalidity of the underlying laws and ordinances which had been thus employed in so invidious a manner "that even-handed administration of the law is not possible." Id., 405 U.S. at 171. Cf. Appellants' main brief, at 31-33.

Nor does the State attend to the context in which statistics were used in *Kahn* v. *Shevin* (1974) 416 U.S. 351. Compare the State's brief at 24 with Note, 89 Harv.L.Rev. 95 (1975). Despite the Court's sensitivity to the insidious impact of sex-based classifications, it indicated in *Kahn* that, in certain limited instances, such classifications might survive constitutional review if in design and operation they genuinely remedy past discrimination. However, the Court has made it plain that a classification publicly billed as "compensatory" will not escape close analysis should it in fact reflect and reinforce familiar stereotypes. See *Weinberger* v. *Wisesnfeld* (1975) 420 U.S. 636, and Note, supra, 89 Harv.L.Rev. at 99-103. In any event, in hypothesizing justifications for Oklahoma's 3.2% beer law, the State does not seriously suggest that the instant discrimination (or monopoly) in purchasing such beer affords any "rectificatory" or "cushioning" benefit to girls presently 18-21 years of age for the effects of economic or social discrimination suffered by now much older women in decades past (as by, e.g., letting today's young women drown in 3.2% beer their sorrows over their mothers' and grandmothers' plight?).

But the chief difficulty in the State's frantic hypothesizing about for some plausible purpose for its statute — at least from the standpoint of simple historical veracity — lies in the tellingly *retroactive* nature of its statistical justificationing: namely, the inescapably fictitious imputation to the 1890 and 1972 Legislatures of familiarity with data totally non-existent when the discrimination was originally enacted, and then re-enacted. See, e.g., Appendix, at 46-47. Indeed, what the State has *actually* proven in this case is that the *now*-claimed justification is clearly the one thing that the Oklahoma

Legislature absolutely could not have considered when it passed the instant discrimination! Thus, the obvious artificiality of the State's finally-selected hypothesizing renders it fatally counter to the rule of *Weinberger* v. *Wiesenfeld*, supra, fn. 16, 420 U.S. at 648.

3. *The Familiar Clichés*

The generalization which the State indulges and which its proof is alleged to support — that boys "drive more, drink more, and commit more alcohol-related offenses" (Appendix, at 43) — should have a familiar ring to this Court. Such generalizations have been rehearsed time and again. "Wives are typically dependent," urged the Solicitor General in *Frontiero* v. *Richardson* (1973) 411 U.S. 677; "men typically have more business experience than women," claimed the husband in *Reed* v. *Reed* (1971) 404 U.S. 71; "most unwed fathers do not want custody of their children," insisted the State Attorney General in *Stanley* v. *Illinois* (1972) 405 U.S. 645; "girls tend to marry earlier," asserted the father in *Stanton* v. *Stanton* (1975) 421 U.S. 7. Lower courts are daily treated to arguments of similar quality. See, e.g., *State* v. *Chambers* (1973) 63 N.J. 287, 307 A.2d 78, 82 ("females are more rehabilitation-prone than males"). These arguments "coincide with the role-typing society has long imposed." *Stanton* v. *Stanton*, supra, 421 U.S. at 15. For that very reason some appearance of empirical support can no doubt be presented for any of the propositions recited. But laws designed for a land of male and female stereotypes are inherently invidious. They have all the earmarks of self-fulfilling prophecy. Toleration for such laws under the Equal Protection principle impedes society's adjustment to conditions of latter Twentieth-Century life in which functional justification no longer exists for "the role-typing . . . long imposed." See generally Chafe, The American Woman

(1972); Janeway, Man's World, Woman's Place (1971); Maccoby & Jacklin, Psychology of Sex Differences (1974).

The problem presented by this case is clearly "ripe for action." Cf. State's brief at 31. Oklahoma's 18-21 year old men, whose 3.2% beer may be purchased for them by their like-aged female counterparts, should not be branded "reckless" or "dangerous" by the Legislature. Nor should 18-21 year old girls be stamped "settled" or "quiescent." The 'distinction' peculiar to Oklahoma is "worse than obsolete; it is laughable." Reasoned application of the Equal Protection principle should put it swiftly "out of its misery." See brief of the Amicus Curiae, at 21, fn. 23.

4. Conclusion: Common Justice or Commoner Sense?

It is difficult to say whether it is one's sense of logic, or sense of justice, that is more offended by the situation at bar. For example, the statistics herein, and their transparent manipulation to "prove" the State's case, are ludicrous enough from the mathematical or the coldly intellectual standpoint. But is not our sense of justice equally alarmed at the spectre that the judicial ratification of such statistical maneuverings might be merely the forerunner of similar "justifications" for far more serious, even sinister, erosions of Equal Protection? Likewise, it is also difficult to say whether it is one's common sense, or common justice, that is the more offended over the incongruity of recognizing sufficient maturity in the young man at 18 so as to allow him to vote, conduct business, sire and support a family, and serve in the Armed Forces, but then to dismiss him as too "immature" or "irresponsible" to enjoy the same diluted beverage that his mere dependent may freely purchase in unlimited amounts.

Consider but one of the foregoing activities normally associated with full manhood, that of service in the

Armed Forces. Not only is the American male at 18 deemed man enough to die for Democracy, 10 U.S.C. 505(a), but, to aid him in implementing the Pattonian definition of military patriotism as consisting not so much in dying for one's country as in making the other guy die for his, our young man of 18 is entrusted by the Nation with the possession and employment of modern weaponry of simply unimaginable lethality. Indeed, not only does the Nation trust the American male at 18 with the mere possession and use of such weaponry, to some extent we, the People, even trust him with the command authority to deploy and execute that awesome power of life and death over vast numbers of human beings, for at 18 the young man is also eligible for *commissioning*, not only in the Federal service, 10 U.S.C. 591(b) and Army Regulation 135-100, para. 1-4, but even in Oklahoma's own militia as well, 44 Okla.Stat. 43! Thus, is it our common sense or our common justice that is more outraged when we tell our young patriot that we trust him with the dread powers of life and death in his defense of our Democracy, but that we do not trust him with a cold can of *non*-intoxicating 3.2% beer? That itself is illogic, injustice and injury enough; but then to tell him that in addition his combat-*disqualified* girlfriend[5] *can* be trusted with such beer is nothing less than *insult!*[6]

[5]The U.S. Army prohibits the assignment of female soldiers and officers ("WACs") to combat, or to combat-type units and positions. Army Regulation 10-6, paras. 2-45, 2-46; Army Regulation 611-201, Ch. IV; Army Pamphlet 140-4, para. 3.

[6]One can well imagine, under the present law, the spectacle outside the PX package store at Fort Sill, Oklahoma, of a 20-year-old First Lieutenant of artillery — maybe even a battery commander, with all the power and responsibility that that entails — idling his jeep while his 18-year-old WAC clerk-typist PFC runs in to purchase her CO's six-pack for him! Cf. Appellants' main brief, pp. 45-47.

It is well to the credit of their maturity and their faith in the American way that the young men involved in this case, rather than agitating, demonstrating, or simply defying the instant law, have instead "passed the hat" to obtain the advice and guidance of counsel, and then to institute the present orderly, sober petition to the relevant organs of government for a proper redress of grievances. What they seek, of course, is not so much the beer itself. Rather, they seek nothing more — and nothing less — than that just plain ol' American-as-apple-pie, plain-English *Equality* which but for the present statute and the decision below the commonest of citizens would have assumed was safely beyond any and all conceivable dispute, debate, discussion, or even doubt.

The Appellants therefore pray this Honorable Court to vindicate that most fundamental of their rights as American citizens — Equal Justice Under Law.

Respectfully submitted,

Fred Gilbert

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Attorney for Appellants

CERTIFICATE OF SERVICE

I, Frederick P. Gilbert, a member of the Bar of this Honorable Court and counsel of record for the Appellants herein, do hereby certify that I served, by first class mail fully prepaid, three copies of this Reply Brief of Appellants on counsel for all Appellees herein, to wit: on the Hon. Larry Derryberry, Attorney General of the State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma, Attn: Mr. James Gray, Assistant Attorney General; and on counsel for the Amicus Curiae herein, to wit: on Professor Ruth Bader Ginsburg, Columbia University School of Law, 435 West 116th Street, New York, New York; all this 28 day of September, 1976.

All Parties required to be served have been served.

Fred Gilbert

FREDERICK P. GILBERT
Attorney for Appellants

Supreme Court, U. S.
FILED
FEB 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-628

CURTIS CRAIG and CAROLYN WHITENER,
d/b/a "The Honk and Holler,"

Appellants,

—v.—

HON. DAVID BOREN, Governor, State of Oklahoma, HON. LARRY DERRYBERRY, Attorney General, State of Oklahoma, HON. D. M. BERRY, Chairman, HON. LAWTON L. LEININGER, Vice-Chairman, HON. J. L. MERRILL, Secretary-Member, Oklahoma Tax Commission, HON. RAY WALL, Presiding Judge, Ninth Judicial District Court, State of Oklahoma, HON. CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma, HON. ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma, HON. FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma, and HON. HILARY DRIGGS, Chief of Police, Stillwater, Oklahoma,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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ARGUMENT:

I. Oklahoma's sex/age classification to determine qualification for association with 3.2 beer pigeonholes impermissibly on the basis of gender in violation of the fourteenth amendment's equal protection principle 13

A. This Court's precedent condemns legislative classification based on overbroad generalization about "the way women (or men) are" 13

B. Sex/age lines in the law cannot be justified on any basis—"compelling state interest, or rational basis, or something in between" 15

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-628

CURTIS CRAIG and CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Appellants,

—v.—

HON. DAVID BOREN, Governor, State of Oklahoma, HON. LARRY DERRYBERRY, Attorney General, State of Oklahoma, HON. D. M. BERRY, Chairman, HON. LAWTON L. LEININGER, Vice-Chairman, HON. J. L. MERRILL, Secretary-Member, Oklahoma Tax Commission, HON. RAY WALL, Presiding Judge, Ninth Judicial District Court, State of Oklahoma, HON. CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma, HON. ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma, HON. FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma, and HON. HILARY DRIGGS, Chief of Police, Stillwater, Oklahoma,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Civil Liberties Union respectfully moves, pursuant to Rule 42 of this Court's Rules, to file the within brief *amicus curiae.* Counsel for the appellants has consented to the filing of this brief; counsel for the appellees has refused consent.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the rights of all persons to equal treatment under the law. Recognizing that line drawing by gender is a pervasive problem at all levels of society, and is often reinforced by governmental action, the American Civil Liberties Union has established a Women's Rights Project to work toward the elimination of law-sanctioned gender-based discrimination.

Lawyers associated with the American Civil Liberties Union Women's Rights Project presented the appeal in *Reed* v. *Reed,* 404 U.S. 71 (1971), participated as counsel for the appellants and later as *amicus curiae* in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), represented the appellant in *Kahn* v. *Shevin,* 416 U.S. 351 (1974), the appellees in *Edwards* v. *Healy,* 421 U.S. 772 (1975), and *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975), and the petitioners in *Struck* v. *Secretary of Defense, cert. granted,* 409 U.S. 947, *judgment vacated,* 409 U.S. 1071 (1972), and *Turner* v. *Department of Employment Security,* —— U.S. ——, 96 S. Ct. 249 (1975), and acted as *amicus curiae* in this Court in several other gender discrimination cases.

The American Civil Liberties Union believes that this case, concerning an age of majority differential based solely on gender, presents an issue significant to the realization of full equality between the sexes under the law. For such differentials cast the weight of the state on the side of traditional notions about the expected behavior of males and females, shore up artificial barriers to the attainment by women and men of their full human potential, and retard society's progress toward equal opportunity, free from gender-based discrimination. Because of the contribution

the American Civil Liberties Union Women's Rights Project has made to the reasoned development of the law in this area, we believe our brief will be of substantial assistance to the Court in the resolution of the issues raised by this case.

Respectfully submitted,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The interest of *amicus* appears from the foregoing motion.

Opinion Below

The opinion of the United States District Court for the Western District of Oklahoma, sitting as a three-judge court, is reported at 399 F. Supp. 1304 (1975).

Jurisdiction

On May 17, 1975, the United States District Court for the Western District of Oklahoma, sitting as a three-judge court, filed the judgment which is the subject of this appeal. Appellants' timely motion for a new trial was denied on July 14, 1975. Notice of appeal to the Supreme Court of the United States was filed on August 11, 1975. Following an October 8, 1975 order by Mr. Justice White extending the time for docketing the appeal, the Jurisdictional Statement was filed on October 28, 1975. Appellees' Motion to Affirm was filed on December 10, 1975. Probable jurisdiction was noted on January 12, 1976. Jurisdiction to review this decision on appeal is conferred by 28 U.S.C. §1253.

Statutes Involved

37 Okla. Stat. §§241 and 245 provide:

> §241. *Sale, barter or gift to minor unlawful.*—It shall be unlawful for any person who holds a license to sell and dispense beer and/or any agent, servant, or employee of said license holder to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) per cent

> of alcohol measured by weight. Provided, a parent as regards his own child or children, is excepted from the provisions of this Act.
>
> §245. *"Minor" defined.*—A "minor," for the purposes of Sections 241 and 243 of Title 37 of the Oklahoma Statutes, is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years.

Question Presented

Whether 37 Okla. Stat. §§241, 245, prohibiting sale of "non-intoxicating" alcoholic beverages to "minors" and defining as minors males under the age of 21 and females under the age of 18, establishes a gender-based differential impermissible under the fourteenth amendment to the Constitution.

Statement of the Case

This action was commenced on December 20, 1972 to declare unconstitutional and enjoin the enforcement of the gender line established in 37 Okla. Stat. §§241 and 245. Those statutes prohibit the sale of 3.2 percent beer to minors, defined as females under the age of 18 and males under the age of 21. Appellees are state officials charged with enforcement of the statutes in question. Appellants are (1) a male university student over the age of 18 but under the age of 21 and (2) a licensed retail vendor of 3.2 percent beer. The former wishes to purchase, and the latter to sell 3.2 percent beer free from the age limitation applicable to males only.

Since 1933, Oklahoma has separately classified and regulated "intoxicating" and "nonintoxicating" alcoholic beverages. 37 Okla. Stat. §163.1 et seq. Beverages containing more than 3.2 percent alcohol by weight are declared to be "intoxicating." Beverages containing not more than 3.2 percent alcohol by weight are declared "nonintoxicating." Primarily, if not exclusively, the "nonintoxicating" category encompasses 3.2 percent beer. 37 Okla. Stat. §537 (a)(1) prohibits the sale of "intoxicating" alcoholic beverages to any person under 21 years of age. The legislation in question, 37 Okla. Stat. §§241, 245, prohibits the sale of "nonintoxicating" beverages, which encompasses 3.2 percent beer, to males under the age of 21, but permits their sale to females at the age of 18.[1]

Based on this Court's precedent in gender discrimination-equal protection cases from *Reed* v. *Reed,* 404 U.S. 71 (1971), to *Stanton* v. *Stanton,* 421 U.S. 7 (1975), the court below determined that defendant state officials (appellees herein) must demonstrate a fair and substantial relationship between the legislature's resort to gender as the classifying factor and the legislative objective in view. Acknowledging that defendant state officials had not presented, nor had the court otherwise discovered any materials revealing the actual legislative purpose, the court nonetheless concluded: "[W]e feel it apparent that a major purpose . . . was to promote the safety of the young persons affected and the public generally." 399 F. Supp. at 1311 n. 6. The court further concluded, again without any supporting indication in legislative history materials, that

[1] 37 Okla. Stat. §243, prohibiting the employment of minors in a place where "nonintoxicating" beverages are sold for consumption on the premises, is subject to the same gender/age differential. Females may be employed at age 18, males not till age 21.

fair and substantial grounds existed for use of gender as the classifying factor.

The court found "fair and substantial grounds" for the gender line in exhibits tendered by the state officials containing various statistics relating to the drinking proclivities and preferences of males and females, the age and sex of persons arrested[2] for "driving under the influence" and for "drunkenness," and the number of males and females killed or injured in motor vehicle collisions.[3] The court itself twice characterized this proffered data as subject to "several" or "various" criticisms. 399 F. Supp. at 1311 & n. 4. Moreover, the court acknowledged that a study undertaken by the University of Oklahoma Medical Center, and introduced at trial by appellants, established "females were physically no more able, and in some instances were less able, than males to handle comparable alcohol dosages." 399 F. Supp. at 1311. Further, it observed "the case is not free from doubt." 399 F. Supp. at 1314. Despite its expressed doubt and the conceded absence of any evidence as to the basis upon which the legislature in fact acted, the court appraised the quality of the state officials' proof as sufficient to overcome the burden assigned to them. No account was taken of the probability that a similar showing of alcohol use proclivities and preferences could be made along ethnic lines.[4] Nor was any account taken of the reality that proof of the same quality was in fact adduced, or was readily available in census data in supp[illegible] of the

[2] Defendant state officials, on grounds of administrative inconvenience, supplied no evidence as to convictions.

[3] The traffic accident statistics supplied no indication as to alcohol use (or other fault or culpability) by the drivers or the persons killed or injured in motor vehicle collisions.

[4] See note 26, *infra.*

gender lines overturned by this Court in *Reed* v. *Reed, supra; Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975); and *Stanton* v. *Stanton, supra.*[5]

Summary of Argument

I.

37 Okla. Stat. §§241, 243 and 245, establishing a sex/age line to determine qualification for association with 3.2 beer, discriminates impermissibly on the basis of gender in violation of the fourteenth amendment's equal protection clause. This legislation places all 18-20 year old males in one pigeonhole, all 18-20 year old females in another, in conformity with familiar notions about "the way women (or men) are." Upholding the legislation, the court below relied upon overbroad generalizations concerning the drinking behavior, proclivities and preferences of the two sexes. Such overbroad generalization as a rationalization for line-drawing by gender cannot be tolerated under the Constitution.

The Oklahoma legislation in question is a curiosity, apparently the only law of its kind left in the nation. Similarly, the ruling below is an anomaly. It is inconsistent with this Court's decision in *Stanton* v. *Stanton,* 421 U.S.

[5] Statistics and facts this Court found insufficient to justify classification by gender appear in Motion to Affirm at 6 n. 8, and Brief for the Appellees at 9 n. 6, *Frontiero* v. *Richardson, supra;* Brief for the Appellant at 14 n. 9, *Weinberger* v. *Wiesenfeld, supra.* See also Brief for the Commissioner at 14 (10th Cir.), and Petition for Certiorari at 8-9, *Commissioner of Internal Revenue* v. *Moritz, cert. denied,* 412 U.S. 906 (1973), opinion below, 469 F.2d 466 (10th Cir. 1972).

7 (1975), and out of step with an array of authority in lower courts, federal and state, decisions that have made museum pieces of male/female age of majority differentials.

Just as age of majority gender-based differentials have been declared inconsonant with the equal protection principle, so have sharp lines between the sexes relating to the purchase, sale or consumption of alcoholic beverages. The decision below apart, the sole authority for differential treatment of the sexes in relation to alcoholic beverage association is *Goesaert* v. *Cleary,* 335 U.S. 464 (1948). Widely criticized in commentary, in square conflict with decisions of this Court in the current decade and with national equal employment opportunity policy, and politely discarded by the nation's lower courts, *Goesaert* is a decision overdue for formal burial.

On the surface, Oklahoma's 3.2 beer sex/age differential may appear to accord young women a liberty withheld from young men. Upon deeper inspection, the gender line drawn by Oklahoma is revealed as a manifestation of traditional attitudes about the expected behavior of males and females, part of the myriad signals and messages that daily underscore the notion of men as society's active members, women as men's quiescent companions.

II.

Beyond question, Oklahoma has broad authority to regulate effectively the sale and service of alcoholic beverages. But the twenty-first amendment does not insulate from review legislative resort to gross classification by gender. Just as drinking preferences and proclivities associated with a particular ethnic group or social class would be perceived

as an unfair and insubstantial basis for a beverage sale or service prohibition directed to that group or class, so a gender-based classification should be recognized as an inappropriate, invidious means to the legislative end of rational regulation in the public interest.

III.

Even if the highly questionable statistical presentation on which the court below relied served to prove the proposition asserted by appellees (males "drive more, drink more, and commit more alcohol related offenses"), that proposition does not suffice to justify the sex/age classification here at issue. But in fact, the statistical presentation does not do the service claimed for it.

The arrest statistics tendered are unaccompanied by any information as to convictions; no indication is offered of the number of male and female *individuals* arrested; not a single arrest is attributed to 3.2 beer drinking; no attempt is made to deal with the documented "chivalry factor," the reality that for the very same behavior, the young man may be arrested, while the young woman is escorted home. The highway death and injury statistics, the state officials conceded below, are not "specifically on point," for they supply no indication whatever of alcohol involvement in collisions. Finally, the roadside survey introduced below, based on a small and disproportionately male sample, yielded results that may not be generalized to the under-21 Oklahoma population, and provides no information at all as to 3.2 beer drinking.

In sum, the state officials utterly failed to demonstrate that the hypothesized legislative objective (protection of young men and the public from weaknesses male flesh is heir

to) is fairly, substantially and sensibly served by a 3.2 beer sex/age line. The legislation in question is a bizarre and paradoxical remnant of the day when "anything goes" was the rule for line-drawing by gender. 37 Okla. Stat. §§241 and 245, and the decision upholding those provisions, merit this Court's decisive disapprobation.

ARGUMENT

I.

Oklahoma's sex/age classification to determine qualification for association with 3.2 beer pigeonholes impermissibly on the basis of gender in violation of the fourteenth amendment's equal protection principle.

A. *This Court's precedent condemns legislative classification based on overbroad generalization about "the way women (or men) are."*

Since *Reed* v. *Reed,* 404 U.S. 71 (1971), this Court has instructed consistently that gender-based legislative classification, premised on overbroad generalization concerning the behavior, proclivities and preferences of the two sexes, cannot be tolerated under the Constitution. *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Taylor* v. *Louisiana,* 419 U.S. 522 (1975); *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975); *Stanton* v. *Stanton,* 421 U.S. 7 (1975). The decision below rests exclusively upon such overbroad generalization. That decision, and the gender line it upholds, merit this Court's decisive disapprobation.

Recognizing that it is no longer in vogue to rely on the "demonstrated facts of life"[6] to justify gender lines in the

[6] *Lamb* v. *Brown,* 456 F.2d 18, at 20 (10th Cir. 1972).

law, appellees offered statistics which, they asserted, tended to show that 18-20 year old males "drive more, drink more, and commit more alcohol related offenses." [7] Even if the highly questionable statistical presentation[8] served to prove the proposition asserted by appellees, that proposition does not suffice to justify the sex/age classification here at issue. Indeed, had proof of the quality presented below satisfied the demands of the equal protection principle, the gender lines this Court has so firmly rejected would have remained on the books.

For example, in *Reed,* the proposition that men have more business experience than women was not without empirical support. In *Frontiero* and in *Wiesenfeld,* the statistics tendered by the Government to document men's nondependency, and their labor-market orientation,[9] were far more impressive than the concededly infirm data[10] relied upon in the case at bar. In short, the essence of this Court's decisions condemning laws drawing "a sharp line between

[7] Transcript of Proceedings before the United States District Court for the Western District of Oklahoma, *Walker* v. *Hall,* May 20, 1974 [hereafter cited as Transcript] at 5 (Appendix at 43) (opening statement of Oklahoma Assistant Attorney General). As the court below repeatedly noted, Oklahoma's statistical presentation indicated that males 21 and over "drive more, drink more and commit more alcohol related offenses" than males in the 18-20 age range. See 399 F. Supp. at 1309, 1311 n. 5.

[8] See pp. 25-34, *infra.*

[9] *E.g.,* to demonstrate men's independence and work force participation, appellees in *Frontiero* presented census data showing that in 1971, "97.7 percent of married men between the ages of 25 and 44, whose wives were present, were in the civilian labor force." Brief for the Appellees at 9 n. 6, *Frontiero* v. *Richardson, supra.*

[10] See 399 F. Supp. at 1311 & n. 4; Transcript at 37-38 (Appendix 66-67) (Assistant Attorney General concedes traffic death and injury statistics (Exhibit 5) do not indicate level of intoxication, if any, and are not "specifically on point"); pp. 29-30, *infra.*

the sexes" [11] escaped appellees and the court below: neither unsubstantiated stereotypes nor generalized factual data suffice to justify pigeonholing by gender; a legislature may not place all males in one pigeonhole, all females in another, based on assumed or documented notions about "the way women or men are."

The sole post-*Reed* cases in which this Court has countenanced classification based on "gender as such" [12] involved legislation justified as compensating women for past and present economic disadvantage. *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Kahn* v. *Shevin,* 416 U.S. 351 (1974). But Oklahoma's action cannot be rationalized on the ground that nowadays, females may be favored, but not disfavored by the law. For surely the concept "compensatory" or "rectificatory" gender classification[13] does not encompass the solace 3.2 beer might provide to young women already exposed to society's double standards or about to encounter an inhospitable job market.

B. *Sex/age lines in the law cannot be justified on any basis—"compelling state interest, or rational basis, or something in between."*

In *Stanton* v. *Stanton, supra,* this Court held that Utah's sex/age line, drawn for child support purposes, could not survive careful review, whatever the appropriate test, "compelling state interest, or rational basis, or something in between." 421 U.S. at 17. The Court noted that male/female age of majority differentials have become museum

[11] The phrase appears in this Court's discredited decision in *Goesaert* v. *Cleary,* 335 U.S. 464, 466 (1948); see pp. 19-20, *infra.*

[12] See *Geduldig* v. *Aiello,* 417 U.S. 484, at 496 n. 20 (1974).

[13] Cf. *Frontiero* v. *Richardson, supra,* 411 U.S. at 689 n. 22.

pieces in most states. 421 U.S. at 15. Appellees have not pointed to, nor has our investigation disclosed any state other than Oklahoma that today maintains a sex/age line for "nonintoxicating" 3.2 beer, or even "intoxicating" alcoholic beverage sales.[14] Nor has investigation revealed any state other than Oklahoma that today draws a gender line to determine who may work in a place where alcoholic ("intoxicating" or "nointoxicating") beverages are sold.

The three-judge court hearing in the instant case occurred on May 20, 1974. The decision was filed almost a year later, on May 17, 1975. This Court's decision in *Stanton* was issued on April 15, 1975. It may be that the court below did not sufficiently consider or reflect upon *Stanton* when it voted to uphold Oklahoma's singular 3.2 beer law. While the three-judge court opinion purports not to rely on "old notions" but to rest upon a statistical revelation of sex-linked proclivities, census data provides numerical support of the same quality for the assumptions operative in *Stanton*. If statistics show that young men "drive more" and "drink more," they also show young women marry and relinquish education earlier. Yet surely factual data on the "nesting" proclivity of women[15] would not have persuaded a majority of this Court to uphold Utah's differential.

In sum, the Utah decision in *Stanton* and the decision below ultimately rely on the very same notion—that gross categorization by gender is legitimate legislative action.

[14] Appellees introduced Exhibits (7 and 8) concerning experience in two other states, Minnesota and Michigan. Significantly, legislators in those states did not conceive of a sex/age line as a rational response to a traffic safety problem.

[15] See Transcript at 71 (Appendix at 91).

Indeed, the transcript of the three-judge court hearing[16] strongly suggests that a familiar assumption, not fully articulated in the opinion, influenced the decision—namely, that it is "safe" to allow young women to drink 3.2 beer because young women are (usually) more "mature" than young men, and are (inclined to be) passive, unassertive, "settled," while young men are (generally) boys at heart, (apt to be) adventurous, daring, even reckless. But whether or not the court below wholly discarded "old notions" about the earlier maturation of females, the Oklahoma legislature may have had precisely those notions in mind when it allowed females, but not males, to purchase 3.2 beer and work in 3.2 beer parlors at 18.[17] The hypothesis that the legislature responded to "the common myth" that "women mature faster than men" is at least as plausible as any post-*Stanton* hypothesis defenders of the 3.2 beer sex/age differential might conceive.

The ruling below, in short, is a curiosity. It conflicts with *Stanton* and virtually every other recent adjudication concerning sex/age differentials in the law. See, *e.g.*, *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972); *Matter of Patricia A.*, 31 N.Y.2d 83, 335 N.Y.S.2d 33, 286 N.E. 2d 432 (1972); *Tang* v. *Ping*, 209 N.W. 2d 624 (N. Dak. 1973); *Harrigfeld* v. *District Court*, 95 Idaho 540, 511 P.2d 822 (1973); *Phelps* v. *Bing*, 58 Ill.2d 32, 316 N.E.2d 775 (1974).

[16] See Transcript at 68-78, 95-97 (Appendix at 89-96, 109-111).

[17] See Transcript 68-70 (Appendix at 89-91). Indeed, the first hypothesis tendered by the state officials as to the legislative rationale was "[t]hat there is a difference in the ages of maturity between males and females, with males maturing at an older age." Motion to Dismiss at 7 (Appendix at 19).

C. *Gender-based discrimination in laws regulating the sale and consumption of alcohol is wholly without support in currently viable precedent.*

This case involves more than an impermissible sex/age differential. It also involves the lore relating to women and liquor—a combination that has fascinated lawmen for generations. The legislation at issue is a manifestation, with a bizarre twist, of the erstwhile propensity of legislatures to prescribe the conditions under which women and alcohol may mix. In recent years, however, outside Oklahoma, such legislation has been relegated to history's scrap heap. As the Court of Appeals for the First Circuit said of once traditional judicial essays in this area, "the authority of those precedents . . . has waned with the metamorphosis of the attitudes which fed them. What was then gallantry now appears Victorian condescension or even misogyny, and this cultural evolution is now reflected in the Constitution." *Women's Liberation Union of Rhode Island* v. *Israel,* 512 F.2d 106, 109 (1st Cir. 1975).

The case at bar apart, this decade's precedent unequivocally rejects discrimination between men and women in laws regulating the sale and consumption of alcohol. See *Women's Liberation Union of Rhode Island* v. *Israel, supra; White* v. *Fleming,* 522 F.2d 730 (7th Cir. 1975); *Daugherty* v. *Daley,* 370 F. Supp. 338 (N.D. Ill. 1974) (three-judge court); *Commonwealth* v. *Burke,* 481 S.W.2d 52 (Ky. 1972); *Sail'er Inn, Inc.* v. *Kirby,* 5 Cal. 3d 1, 485 P.2d 529 (1971); *Paterson Tavern & Grill Owners Ass'n* v. *Hawthorne,* 57 N.J. 180, 270 A.2d 628 (1970). In both result and reasoning, the judgment below is an isolated retrogression, packaged in an opinion that jousts with conflicting decisions but ultimately fails to offer a single supporting authority.

Only by wishing away current precedent and reaching back more than a quarter of a century to *Goesaert* v. *Cleary,* 335 U.S. 464 (1948), can Oklahoma conjure up support for a gender-based differential in the context of liquor regulation. Once formidable authority for "a sharp line between the sexes," *Goesaert* is today an embarrassment reflecting male/female role delineation "offensive to the ethos of our society." *United States* v. *Dege,* 364 U.S. 51, at 53 (1960). *Goesaert* appears conspicuously in briefs tendered below by the state officials. But significantly, the three-judge court avoided citation to *Goesaert,* tied as that decision so plainly is to "old notions" and "archaic or overbroad generalizations." See 399 F. Supp. at 1313.

The statute in *Goesaert,* prohibiting employment of women as bartenders, was rationalized as protecting females and the public against "moral and social problems." 335 U.S. at 466. But suspicion lurked that "the real impulse behind [the] legislation was an unchivalrous desire of male bartenders to . . . monopolize the calling." 335 U.S. at 467.[18] In the instant case too, the purported rationale is protection, ironically, protection of males and the public against the vulnerabilities of the dominant sex. But the acknowledged basis for the once pervasive 18 female/21 male age of majority differential[19] suggests another perspective. Is it not probable that Oklahoma's legislators had in view likely coupling at the beer parlor—

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[18] See "Bartending Must Revert to Bartenders, Says the G.E.B.," in Catering Industry Employee (April 12, 1946 pp. 4-5), extracted in Babcock, Freedman, Norton & Ross, Sex Discrimination and the Law 280 (1975).

[19] See L. Kanowitz, Women and the Law 10-13 (1969); Davidson, Ginsburg & Kay, Sex-Based Discrimination 119-123 (1974).

the 21 year old male paired with a female two or three years his junior?

It bears emphasis that no legislative history informed the conjecture of the court below as to the lawmaker's design. Post hoc attempts to hypothesize an appropriate rationale, though once routinely accepted where gender lines were at issue, are no longer immune from close scrutiny. Cf. *Weinberger* v. *Wiesenfeld, supra,* 420 U.S. at 648 n. 16. Moreover, no legislative design has been advanced that would even remotely satisfy the constitutional requirement that, at the least, gender-based classification must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ." *Reed* v. *Reed, supra,* 404 U.S. at 76. For gender is no more rational or less arbitrary a criterion upon which to base liquor or traffic safety laws than is religion or national origin.[20] If ethnic identification were the criterion, however buttressed by proof of drinking proclivities and preferences, the state officials would "concede error."[21] Their willingness and the three-judge court's readiness to accept the gender line as unobjectionable warrant prompt correction by this Court.

In sum, the instant case provides an opportunity for this Court explicitly to overrule *Goesaert,* a decision universally criticized in commentary,[22] politely discarded by enlight-

[20] See note 26, *infra.*

[21] See Transcript at 79 (Appendix at 97-98).

[22] See, *e.g.*, L. Kanowitz, Women and the Law 33-34 (1969); Johnston, Jr. & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 682-92 (1971).

ened jurists, overdue for formal burial. Cf. *Taylor* v. *Louisiana,* 419 U.S. 522 (1975), overruling *Hoyt* v. *Florida,* 368 U.S. 57 (1961). Another opportunity seems unlikely in view of the singularity of Oklahoma's gender line and the illegality of the *Goesaert* classification, as well as the one in 37 Okla. Stat. §243 (18-20 year old females, but not 18-20 year old males may be employed in places where 3.2 beer is sold for on-premises consumption), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and state law analogs. See *Sail'er Inn, Inc.* v. *Kirby, supra; Rosenfeld* v. *Southern Pacific Co.,* 444 F.2d 1219 (9th Cir. 1971).

D. *Laws such as 37 Okla. Stat. §§ 241, 243, 245 shore up artificial barriers to realization by men and women of their full human potential and retard society's progress toward equal opportunity, free from gender-based discrimination.*

Oklahoma's sex/age 3.2 beer line may appear at first glance a sport, a ridiculous distinction.[23] In comparison to other business vying for this Court's attention, 37 Okla. Stat. §§241, 243, 245 might be viewed as supplying comic relief. Yet if this Oklahoma legislative action is not checked, if the overbroad generalizations tendered in its

[23] See Editorial, Tulsa Daily World, January 13, 1975, at 8-A:

> Oklahoma's ridiculous beer law has finally made the big time; it's gone all the way up to the U.S. Supreme Court.
>
> . . . .
>
> For years it has been argued that this is a stupid distinction that, if it ever did have a justification, it was long outdated. It is worse than obsolete; it is laughable . . . .
>
> Let us hope the Justices dispose of it quickly, putting it quietly out of its misery.

support are allowed to stand as proof adequate to justify a gender-based criterion, then this Court will have turned back the clock to the day when "anything goes" was the approach to line drawing by gender. For any defender of a gender line, with a modicum of sophistication, could avoid express reliance on "old notions" and, instead, invoke statistics to "demonstrate the facts of life." [24] But this Court's recent precedent should stand as a bulwark against "the imposition of special disabilities upon the members of a particular sex because of their sex." *Frontiero* v. *Richardson, supra,* 411 U.S. at 686. For "[w]here the relation between characteristic and evil to be prevented" is as "tenuous" as it is here, "courts must look closely at that characteristic lest outdated social stereotypes result in invidious laws or practices." *Sail'er Inn, Inc.* v. *Kirby, supra,* 5 Cal. 3d at 18, 485 P.2d at 540.

On its face, Oklahoma's 3.2 beer differential accords young women a liberty withheld from young men. Upon deeper inspection, however, the discrimination is revealed as simply another manifestation of traditional attitudes and prejudices about the expected behavior and roles of the two sexes in our society, part of the myriad signals and messages that daily underscore the notion of men as society's active members, women as men's quiescent companions, members of the "other" or second sex. S. de Beauvoir, Second Sex (1949); see E. Maccoby & C. Jacklin, Psychology of Sex Differences (1974); W. Chafe, The American Woman (1972); Broverman, Vogel, Broverman, Clarkson & Rosencrantz, Sex-Role Stereotypes: A Current Appraisal, 28 J. Social Issues 59 (1972).

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[24] Cf. *Lamb* v. *Brown,* 456 F.2d 18, at 20 (10th Cir. 1972).

Laws such as 37 Okla. Stat. §§241, 243, 245 serve only to shore up artificial barriers to full realization by men and women of their human potential, and to retard progress toward equal opportunity, free from gender-based discrimination. Ultimately harmful to women by casting the weight of the state on the side of traditional notions concerning woman's behavior and her relation to man, such laws have no place in a nation preparing to celebrate a 200-year commitment to equal justice under law.

II.

The twenty-first amendment does not insulate from close scrutiny Oklahoma's separation of 3.2 beer purchasers along gender lines.

As a "main reason" for its decision, the court below proffered, "the statutes in question concern the regulation of alcoholic beverages—an area where the State's police powers are strengthened by the Twenty-first Amendment." 399 F. Supp. at 1307. Ambivalent, if not schizophrenic on this point, the court also asserted, the twenty-first amendment "does not call for the use of a less stringent equal protection standard than would otherwise apply," "the standards of review [the Equal Protection Clause] mandates are not relaxed." 399 F. Supp. at 1307-1308.

Beyond question, Oklahoma has broad authority to require effectively the sale and service of alcoholic beverages. But the twenty-first amendment is not a talisman insulating from careful review legislative resort to gross classification by gender. This has been the clear understanding of federal and state jurists attentive to this Court's precedent in the current decade. See, *e.g., Women's Liberation Union of*

Rhode Island v. *Israel*, 512 F.2d 106 (1st Cir. 1975); *White* v. *Fleming*, 522 F.2d 730 (7th Cir. 1975); *Daugherty* v. *Daley*, 370 F. Supp. 338 (N.D. Ill. 1974) (three-judge court); cf. *Commonwealth* v. *Burke*, 481 S.W.2d 52 (Ky. 1972); *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971); *Paterson Tavern & Grill Owners Ass'n.* v. *Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1975).[25] Just as drinking preferences and proclivities associated with a particular ethnic group or social class would be perceived as an unfair and insubstantial basis for a beverage sale or service prohibition directed to that group or class (see Transcript at 79, Appendix at 97-98) so a gender-based[26] classification should

[25] As to the precedential value of *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), see pp. 19-21, *supra*. For an account of pre-*Reed* judicial performance, see Johnston, Jr. & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 682-92, 702-708 (1971).

[26] The "facts of life" the state officials sought to demonstrate, cf. *Lamb* v. *Brown*, 456 F.2d 18, at 20 (10th Cir. 1972), might have been demonstrated more dramatically with respect to ethnic and religious groups. Yet surely the long-recognized and well-documented ethnic and religious differences in drinking habits and problems would not justify legislation using ethnic identification or religion as the criterion for a 3.2 beer or any other beverage regulation. See, *e.g.*, Wechsler, Thum, Demone & Kasey, Religious-Ethnic Differences in Alcohol Consumption, 11 J. of Health & Social Behavior 21 (1969); Wechsler, Thum, Demone & Dwinnell, Social Characteristics and BAC Level, 33 Quarterly Journal of Studies on Alcohol 132, 143-44 (1972) (Jews and Italian Catholics consistently manifest the lowest frequencies of positive BAC readings, highest frequencies occur among native-born, Canadian, and Irish Catholics; in the 16-25 age groups, native-born Catholics had the highest proportion with positive BACs (19% in the study reported), Jews and Italian Catholics, the lowest (5%)). Among adolescents, conspicuous differences appear as well. See Williams, Brehm, Cavanaugh, Moore & Eckerman, Final Report of Research Triangle Institute Center for the Study of Adolescent Drinking Behavior, Attitudes and Correlates 7 (National Institute on Alcohol Abuse and Alcoholism, U.S. Department of Health, Education, and Welfare, April 1975) (reporting percentage of adolescent heavy drinkers by ethnic group as follows: Black, 5.7%; White 10.7%; American Indian, 16.5%). See also Kandel, Single & Kessler, The Epidemiology of Drug Use Among New York State High School Students, 66 Am. J. Pub. Health 43, Table 2 (Jan. 1976).

be recognized as an inappropriate, invidious means to the legislative end of rational regulation in the public interest.

Several times in the course of its opinion, the court below found "reinforcement" in this Court's decision in *California* v. *LaRue*, 409 U.S. 109 (1972). *LaRue* upheld state regulations prohibiting nude dancing and explicit sexual acts in establishments licensed to sell liquor by the drink. But whatever support the twenty-first amendment provides for state action explicitly and precisely directed to the commingling of live sex and liquor,[27] that brand of "sex" is not the issue in the case at bar.[28]

III.

The statistical proof on which the court below relied fails to establish that the hypothesized legislative objective (protection of young men and the public, particularly on the road) is fairly, substantially or sensibly served by a 3.2 beer sex/age line.

Evidence "entirely in the form of statistics," embodied in eight exhibits, was the sole proof presented by the state officials. (Transcript at 5, Appendix at 43.) As developed

[27] See Comments, 1975 Wis. L. Rev. 161; 24 Syr. L. Rev. 1131 (1973).

[28] For impressionable minds, the word "sex" may conjure up images of the kind this Court has left to "contemporary community standards." See *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973). Gender, the grammar book term generally used in this brief, has a neutral, clinical tone that may ward off distracting associations.

herein at pp. 13-23, *supra,* even if this proof did the service claimed for it, *i.e.,* even if the proof established that, in general, males within the 18-20 age group "drive more, drink more and commit more alcohol-related offenses" (Transcript at 5, Appendix at 43), such gross generalizations do not provide license for line drawing by gender. In this section, it will be demonstrated that the state officials' presentation does not do the service claimed for it. Further, the presentation falls far short of establishing a fair and substantial relationship between the hypothesized legislative end (traffic safety) and the statutory criterion employed (a sex/age 3.2 beer line).

A. *Oklahoma arrest statistics.*

State officials' Exhibits 1 and 2 (described in 399 F. Supp. at 1309, excerpts reproduced in 399 F. Supp. at 1314-1315) present certain arrest statistics for 1) Oklahoma, covering the last four months of 1973, and 2) Oklahoma City, covering the year 1973.[29] These exhibits show that, for the time periods covered, male arrests for "driving under the influence" and "drunkenness" substantially exceeded female arrests for those offenses.[30] But that is all they show. Unadorned arrest statistics hardly constitute proof that "driving under the influence" and "drunkenness" in the population of 18-20 year olds occur peculiarly in males.

[29] These statistics post-dated the 1972 legislative action here at issue. There is no indication that statistics of any kind informed or influenced the legislative judgment that 18-20 year old males, but not 18-20 year old females, were vulnerable to the hazards of 3.2 beer. See 399 F. Supp. at 1311 n. 6.

[30] Both State and City figures show that male involvement increases with age, *i.e.,* the percentage of female arrests is highest in the 18-20 age range, while the percentage of male arrests is considerably higher at 21 and over than it is at 18. See 399 F. Supp. at 1309.

Among glaring deficiencies in the attempt to associate alcohol-related offenses with young men and 3.2 beer drinking: no evidence whatever was offered as to dispositions or convictions, bare arrests alone are recited;[31] no indication is offered of the number of male and female *individuals* arrested; not a single arrest is attributed to 3.2 beer drinking; no attempt is made to grapple with the "chivalry factor," *i.e.,* the documented reality that for the very same behavior, the male may be arrested, while the female is escorted home, perhaps with a fatherly warning.

As to the inference of offense from arrest, this Court said in *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 241 (1957), "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." See also *Gregory* v. *Litton Systems, Inc.,* 316 F. Supp. 401 (C.D. Calif. 1970) (because of general societal practices, use of arrest records in hiring decisions discriminates on race grounds); *Menard* v. *Mitchell,* 328 F. Supp. 718, at 724 (D.D.C. 1971), *rev'd on other grounds,* 498 F.2d 1017 (D.C. Cir. 1974) ("[O]nly a conviction carries legal significance as to a person's involvement in criminal behavior."); McCormick, *Evidence* §43 at 85 (Cleary ed. 1972).

Moreover, even as arrest indications the statistics are opaque: they do not account for multiple arrests. Forty-seven arrests of eighteen year-old males in Oklahoma City

[31] Because it would have been burdensome to do so, Oklahoma law enforcement officers did "not even attempt to keep dispositions as to age groups." Transcript at 26-27 (Appendix at 59). Cf. Transcript at 9 (Appendix at 46-47).

could mean 47 different young men were arrested, or one young man was arrested 47 times, or something in between. In short, the arrest figures do not even negate the possibility that the disproportion is attributable to multiple arrests on the male side, rather than to marked disparity in the number of males and females arrested. Additionally, the arrest statistics demonstrate no relationship between the alleged offense and drinking 3.2 beer, the prohibition which the statistics purport to support. In view of the relative potencies of the beverages, arrestees' alcohol association, if any, might more likely involve 100-proof vodka than "nonintoxicating" 3.2 beer.

Furthermore, Exhibits 1 and 2 tell a familiar story. National arrest statistics for all age groups and most offenses reflect a similar pattern. For example, in 1964, while the sex ratio varied considerably by type of offense, the average arrest ratio of males to females was 7.5 to 1. See Reckless & Kay, *The Female Offender* 4 (1967). See also Nagel & Weitzman, Women as Litigants, 23 Hastings L. J. 171 (1971). Viewed in this light, Oklahoma's arrest figures almost certainly suggest more about the conduct and attitudes of the state's police officers than they do about the 3.2 beer drinking habits of young men and women. For prime among factors identified as relevant to the underinvolvement of women in officially-acted-upon crime is the "chivalry factor," *i.e.*, men's willingness to cover up women's crimes, and the unwillingness of the public and law enforcement officers to hold women accountable for criminal activity. Reckless & Kay, *supra,* at 13.[32]

[32] Paternalism in the criminal justice system and stereotypical views on women's nature do not always operate benignly in women's favor. See, *e.g., New Jersey* v. *Chambers,* 63 N.J. 287, 307 A.2d 78 (1973); Nagel & Weitzman, *supra;* Note, The Sexual Segregation of American Prisons, 82 Yale L. J. 1229 (1973).

B. *Oklahoma traffic death and injury statistics.*

State officials' Exhibits 4 and 5 indicate the number of persons killed and injured in 1972 and 1973 Oklahoma motor vehicle traffic collisions. Youths 17-21 are overrepresented in these statistics; for all age groups, the number of males exceeds the number of females.[33] Although presumably introduced to illustrate the "evil" the legislature sought to prevent, as the state officials themselves acknowledged, these Exhibits are not "specifically on point" (Transcript at 37, Appendix at 67), for they supply no indication whatever of alcohol involvement in collisions.[34] (Transcript at 36, Appendix at 66.) Indeed, closer examination of the state officials' Exhibits should have demonstrated that overrepresentation of young persons in collisions is *not* occasioned by alcohol use:

> If younger drivers were involved in more collisions than older drivers because of the excessive use of alcohol, it would be expected that: (a) young drivers would show a higher frequency of driving-after-drinking than older drivers; and (b) that young drivers would have

[33] However, if state officials' Exhibit 3 is any guide to relative male/female road use, then the 17-21 female death rate is about the same as the male rate, while the 17-21 female injury rate is substantially higher than the male rate. *I.e.,* the 1972 roadside survey population reported in Exhibit 3 was 78% male, 22% female. 399 F. Supp. at 1309. Females accounted for 23% of traffic deaths in the 17-21 age group that year, and 40% of traffic injuries. 399 F. Supp. at 1320 (Exhibit 4).

[34] For all these Exhibits reveal (pedestrian, passenger and driver death and injuries are lumped together in the portions of the Exhibits excerpted by the court below, 399 F. Supp. at 1320-1321), all collision victims may have been free from fault, and all persons responsible for the deaths and injuries may have been 18-20 female 3.2 beer drinkers.

a worse collision-involvement index among all drivers, whether they had been drinking or not, than among alcohol-free drivers. *A comparison of Tables 7 and 8 shows that this is not true.* (Emphasis supplied.)

Proceedings of the Joint Conference on Alcohol Abuse and Alcoholism, February 21-23, 1972, Defendants' (state officials') Exhibit 8 at 120, 124 (Appendix at 213-214). In short, Oklahoma's age- but not alcohol-correlated collision statistics suggest a relationship between accidents and driving experience. They might well support a compulsory driver-training law, but they provide no basis for a 3.2 beer sex/age classification.

C. *National, Minnesota and Michigan statistics and reports.*

Exhibit 6 (Appendix at 182-184) is an FBI report showing an increase nationwide in arrests for "driving under the influence." It reveals no convictions, shows nothing about 3.2 beer drinking and does not present any sex/age breakdown for 18-20 year olds. Exhibit 7 (Appendix at 185-207), a Minnesota Department of Public Safety report, was introduced to show "Oklahoma statistics are at least in line with statistics in other states." (Transcript at 41, Appendix at 70.) Minnesota maintains no sex/age line for 3.2 beer or, indeed, any other beverage. Exhibit 8 (Appendix at 208-226), a federally-sponsored conference report, was introduced for its reference to a Michigan study. A portion of the Michigan study is quoted in the opinion below. 399 F. Supp. at 1310. Michigan maintains no sex/age line for 3.2 beer or, indeed, any other beverage. As already noted,[35] the Michigan report, in a passage skipped over by

[35] See p. 29, *supra*.

the court below, explains that younger drivers are *not* involved in more collisions than older drivers because of the excessive use of alcohol.

D. *A roadside survey in Oklahoma City.*

The remaining item in appellees' proof, state officials' Exhibit 3, figures in the opinion below as the *pièce de résistance*. This Exhibit summarizes the results of a voluntary roadside survey of drivers in selected locations in Oklahoma City during the post-work hours 6:00 p.m. to 10:00 p.m. and 11:00 p.m. to 3:00 a.m. in August of 1972 and 1973. Drivers were asked: 1) Do you drink? 2) If you do, what is your drink preference (beer,[36] wine, liquor)? 3) Did you drink in the last two hours? Survey participants were tested for Blood Alcohol Concentrations (BACs). No inquiry was made as to 3.2 beer drinking. The survey provides no answers at all to the questions: 1) Did the drivers who stated a preference for beer prefer "nonintoxicating" 3.2 beer over other alcohol beverages? 2) Did any driver consume 3.2 beer within the two hours preceding the survey? 3) Had any driver who registered a positive BAC imbibed 3.2 beer? Whatever limited purpose the survey may have been designed to serve,[37] Exhibit 3 is highly questionable as an indicator of the gender make-up of Oklahoma's driv-

[36] The court below incorrectly reports that in 1972, 84% of the under-20 males surveyed, and 77% of the under-20 females stated that their drirk preference was beer. 399 F. Supp. at 1309. Taking into account nondrinkers in the survey population, 58.8% of the under-20 males and 52.9% of the under-20 females preferred beer.

[37] No testimony was offered as to the purpose of the survey. No basis was laid for any inference that the small male sample (243 males under-20 in 1972, 238 in 1973) and minimal female sample (70 females under-20 in 1972, 68 in 1973) displayed characteristics that may be generalized to the under-20 Oklahoma driv-

ing population, and as a predictor of gender-based differences in conduct related to drinking and driving. The exhibit provides no elucidation of any kind as to conduct related to drinking 3.2 beer and driving.

Males accounted for 52.9% of Oklahoma's driving population in 1972, and 52.5% in 1973. U.S. Department of Transportation, Federal Highway Administration, Drivers Licenses—1972 and 1973.[38] The sample of drivers interviewed for the Oklahoma City survey was 77.8% male in 1972 and 76.8% male in 1973. Similar disproportions appear in the sample of drivers in the 18-20 age range. Although it is reasonable to anticipate more drinking in nighttime hours, it may well be that a daytime hours survey would produce a higher percentage of female drivers and a significantly different distribution in the positive BAC columns.[39] Considering the small size of the survey popu-

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ing population. In addition to the small size of the under-20 survey population, a numerical discrepancy, unexplained in the Exhibit or Transcript, casts further doubt on the survey's utility: the survey reports 243 as the total number of under-20 males interviewed in 1972, but the BAC columns for that group account in numbers and percentages for 253 males. Further, one-third of the "minor" male population covered by Okla. Stat. §§241, 243, 245 (20-year olds) ranks as adults in the survey.

[38] Drivers Licenses—1972, Table DL-1A, p. 6 (18-20 drivers at Table DL-21, Sheet 4); Drivers Licenses—1973, Table DL-1A, p. 8 (18-20 drivers at Table DL-21, p. 14). The most recently published national licensed drivers statistics, covering the year 1974, show these figures for Oklahoma: total licensed drivers, 1,711,805 (52.21% male); 18 year old drivers, 45,565 (53.29% male); 19 year old drivers, 46,155 (53.03% male); 20 year old drivers, 45,191 (52.81% male). U.S. Department of Transportation, Drivers Licenses—1974, Table DL-21, Sheet 4.

[39] Since the survey occurred after work hours and in a city, the sample does not reflect daytime suburban housewife drinking/driving behavior for 18-20 year olds or any other age group. Further, the sample included drivers of "pickup trucks and an occasional motorcycle," drivers more likely to be male. See Exhibit 3, cover letter.

lation, any unprovided for difference in male/female drinking/driving habits, such as time of day, yielding even a very few more women on the road with positive BACs, would drastically alter the female percentages and, in turn, the comparison with the male group. For example, the court below observed: "Of those drivers under 20 [in the 1972 survey] who had a BAC of greater than .01%, 29.7% of the males and 14.3% of the females had a BAC equal to, or greater than, .05%." 399 F. Supp. at 1309. Restating these figures in terms of the total under-20 survey group, 4.35% of the males and 1.43% of the females had a BAC equal to, or greater than .05%. Should a change from nighttime to daytime survey add two more females to the .05% BAC category, the female percentage (4.29%) would nearly match the male's.

In addition, far from supporting distinctive treatment of young men, the survey suggests that age may be more relevant to the drinking behavior of female drivers. For example, in 1972, the percentages of under-20 males and females who answered yes to the question, "Do you drink," are in the same range: 70.4% for males, 68.6% for females. But when young people are compared with their elders (persons 20 and over), young women stand out as the group distinctive in attraction to alcohol: 76.8% of the older men, but only 57.7% of the older women reported themselves as drinkers.

In sum, the state officials have utterly failed to demonstrate that the supposed legislative objective (protection of young men and the public from weaknesses male flesh is heir to) is fairly, substantially and sensibly served by a 3.2 beer sex/age line. On the contrary, the gender criterion retained in 37 Okla. Stat. §§241, 243, 245 is a paradoxical

remnant of the day when sharp lines between the sexes were routinely drawn by the legislature, and just as routinely upheld by the judiciary.

CONCLUSION

For the reasons stated above, the decision of the District Court for the Western District of Oklahoma should be reversed and the gender line drawn in 37 Okla. Stat. §§241, 243 and 245 should be declared unconstitutional.

Respectfully submitted,

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